

# Florida State University Law Review

---

Volume 29 | Issue 1

Article 1

---

2001

## On the Relevance of Economic Efficiency Conclusions

Richard S. Markovits  
[rsm@rsm.com](mailto:rsm@rsm.com)

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

---

### Recommended Citation

Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 Fla. St. U. L. Rev. (2014) .  
<http://ir.law.fsu.edu/lr/vol29/iss1/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# FLORIDA STATE UNIVERSITY LAW REVIEW



ON THE RELEVANCE OF ECONOMIC EFFICIENCY CONCLUSIONS

*Richard S. Markovits*

VOLUME 29

FALL 2001

NUMBER 1

---

Recommended citation: Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1 (2001).

# ON THE RELEVANCE OF ECONOMIC EFFICIENCY CONCLUSIONS

RICHARD S. MARKOVITS\*

INTRODUCTION.....	2
I. PRESCRIPTIVE MORAL EVALUATION.....	8
A. <i>Moral-Rights Argument in the United States</i> .....	9
B. <i>Moral-Ought Arguments</i> .....	11
1. <i>The Non-Liberal Moral Norms (Personal Ultimate Values) That Play a Role in "Moral-Ought" Evaluations: A Partial List and Comparison With the Liberal Basic Moral Principle</i> .....	11
2. <i>The Structure of Moral-Ought Arguments</i> .....	13
II. LEGITIMATE AND VALID LEGAL ARGUMENT IN A LIBERAL, RIGHTS-BASED STATE SUCH AS THE UNITED STATES .....	16
A. <i>Legal-Rights Analysis in the United States</i> .....	16
1. <i>My Position on Legitimate Legal Argument, Valid Legal Argument, and the Existence of Internally Right Answers to Legal-Rights Questions in the United States</i> .....	16
2. <i>My Position on the Legitimate and Valid Way to Identify Different Types of Legal Rights in the United States</i> .....	19
B. <i>Alternative Positions on Legal-Rights Analysis in the United States</i> .....	20
1. <i>Philip Bobbitt</i> .....	21
2. <i>Legal Realists</i> .....	21
3. <i>Critical Legal Studies</i> .....	23
4. <i>Legal Pragmatists</i> .....	23
5. <i>Ronald Dworkin</i> .....	24
6. <i>John Hart Ely</i> .....	25
7. <i>Legal Historians of Ideology</i> .....	25
8. <i>Strict Constructionists</i> .....	25
III. ECONOMIC-EFFICIENCY ANALYSIS AS AN ALGORITHM FOR GENERATING MORAL-RIGHTS AND MORAL-UGHT CONCLUSIONS IN A LIBERAL, RIGHTS-BASED SOCIETY .....	26
A. <i>Economic-Efficiency Analysis as an Algorithm for Generating Moral-Rights Conclusions in a Liberal, Rights-Based Society</i> .....	26
1. <i>The Insensitivity of Economic-Efficiency Analysis to Considerations That Play Crucial Roles in Some Liberal, Moral-Rights Analyses</i> .....	26
2. <i>Four Erroneous Arguments That Underlie the Mistaken Conclusion That Economic-Efficiency Analysis Is an Algorithm for the Assessment of Moral-Rights Claims</i> .....	28
B. <i>Economic-Efficiency Analysis as an Algorithm for Generating Moral-Ought Conclusions in a Liberal, Rights-Based Society</i> .....	34
1. <i>Three Reasons Why Economic-Efficiency Analysis Is Not an Algorithm for the Generation of Moral-Ought Conclusions in Our Culture</i> .....	35
2. <i>A Critique of Two Arguments That Some Economists Believe Establish the Ability of Economic-Efficiency Analysis to Serve as an Algorithm for Generating All, or Most, Public Policy Moral-Ought Conclusions in Our Culture</i> .....	36

---

\* John B. Connally Chair in Law, University of Texas School of Law. B.A., Cornell University, 1963; Ph.D., London School of Economics, 1966; L.L.B., Yale University, 1968; M.A., Oxford University, 1981.

a. <i>A Critique of the Argument That All Economically Efficient Decisions Ought to Be Made Because Making Them Will Bring the Economy to a Pareto-Superior Position</i> .....	36
b. <i>A Critique of the Double-Distortion Argument</i> .....	37
3. <i>Contributions of Economic-Efficiency Analysis</i> .....	41
IV. ECONOMIC-EFFICIENCY ANALYSIS AS AN ALGORITHM FOR GENERATING INTERNALLY CORRECT LEGAL-RIGHTS CONCLUSIONS IN A LIBERAL, RIGHTS-BASED CULTURE .....	43
A. <i>When the Internally Right Answer to the Legal-Rights Question Is Moral-Principle-Based Because the Relevant Legal Right Derives from a Moral Right</i> .....	44
B. <i>When the Internally Right Answer to the Legal-Rights Question Is Personal-Ultimate-Value-Based or Goal-Based Because the Relevant Legal Right Was Created by a Properly Drafted Provision that Was Designed to Instantiate a Personal Ultimate Value or Achieve a Legitimate Concrete Goal</i> .....	47
C. <i>When the Right Answer to the Legal-Rights Question Turns on Textual, Historical, Structural, or Other Considerations That Are Not Captured by Any Moral Principle or Personal Ultimate Value</i> .....	48
CONCLUSION .....	49
APPENDIX.....	50

## INTRODUCTION

Economists define the concept “an increase in economic efficiency” in three different ways. First, they sometimes define the concept in a Pareto-superior sense. A choice is said to be Pareto-superior if and only if it makes somebody better off while making nobody worse off—stated differently, if and only if it moves society to a so-called Pareto-superior position.<sup>1</sup> However, because no (or virtually no) government choice is Pareto-superior, economists almost never employ this definition in practice. Second, economists sometimes employ a “potentially Pareto-superior” definition of “increase in economic-efficiency.” A choice increases economic efficiency under this definition if its combination with a transaction-costless, appropriate resource transfer would bring the economy to a Pareto-superior position. Third, and most often, economists employ what I call the “monetized” definition of “increase in economic efficiency.” In the monetized sense of this concept, a choice increases economic efficiency if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims.<sup>2</sup> Indeed, virtually all applied microeconomic policy and law-

---

1. Economists sometimes also use the parallel expression “Pareto-inferior” to describe choices that make somebody worse off without making anyone better off (i.e., choices that are economically inefficient in a Pareto-inferior sense of that expression).

2. The term “equivalent” is used because the gains and losses may never show up in the affected parties’ dollar holdings—indeed, they may not even be capitalizable by the parties. Roughly speaking, the beneficiaries’ equivalent-dollar gains equal the number of dollars they must receive “in an inherently neutral way” to be made as well off as the choice under review would make them, while the choice’s victims’ equivalent-dollar losses equal the number of dollars they would have to lose “in an inherently neutral way” to be left as poorly off as the choice would leave them. For a detailed analysis of the appropriate

and-economics analyses that focus on economic efficiency implicitly adopt this monetized definition of “increase in economic-efficiency.”

Many, if not most, economists and law-and-economics scholars write and speak as if the analysis of economic efficiency in this monetized sense is an algorithm for the determination of the right answer to all prescriptive moral questions and to all common law, many constitutional law, and some statutory legal-rights questions. Rather than confining themselves to the claim that their analyses reveal which policy would be most economically efficient, these scholars typically assert that their analyses reveal the “optimal” policy or the policy that would secure “the social optimum.” Indeed, even when economists do not use these expressions, the policy-recommendation sections of their economic-efficiency analyses focus exclusively on economic efficiency.<sup>3</sup> This pattern of behavior is not re-

---

way to measure the equivalent-dollar gains of a choice’s beneficiaries and the equivalent-dollar losses of a choice’s victims, see Richard S. Markovits, *A Constructive Critique of the Traditional Definition and Use of the Concept of “The Effect of a Choice on Allocative (Economic) Efficiency”: What is Right and Why the Kaldor-Hicks Test, the Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong*, 1993 ILL. L. REV. 485 (1993) (clarifying the meaning and point of the expression “in an inherently neutral way,” providing a critique of the standard way in which economists and economist-lawyers measure these gains and losses (including a critique of the Kaldor-Hicks test for economic efficiency)), and demonstrating that the Coase Theorem is wrong for the same reasons that the Kaldor-Hicks test is wrong—or, if you prefer, that the arguments that demonstrate that the Kaldor-Hicks test must be significantly revised require a similar revision of the Coase Theorem). I want to anticipate a point to be made later by indicating that choices that increase economic efficiency in this monetized sense may not be potentially Pareto-superior in our actual, Pareto-imperfect world. In our world, one or more Pareto imperfections may make even a transaction-costless transfer—whose combination with the choice in question would have moved the economy to a Pareto-superior position in their absence—sufficiently economically inefficient to preclude not only that transfer but any more complicated, transaction-costless resource transfer from securing a Pareto-superior position.

3. A quick Westlaw search of articles published between 1983 and 1998 revealed at least 123 articles in which scholars equated “maximizing economic efficiency” with “securing the social optimum.” Please note that this tally included articles in which this conflation could be established at a glance. Predictably, the articles dealt with issues that belong to a wide variety of traditional doctrinal fields, including antitrust, bankruptcy, civil procedure, commercial law, contracts, corporate law, environmental law, family law, intellectual property law, international trade law, securities regulation, remedies, regulated industries, telecommunications law, tort law, etc. By name recognition, I identified forty authors or co-authors as Ph.D. economists. I know several of these authors. A few know the limited relevance of economic-efficiency conclusions, but I can assure you that most do not agree with the conclusions this Article reaches.

I hasten to point out that this usage and its analogues are not restricted to the law-and-economics literature. It is equally manifest in the “pure” economics literature. For example, the 1999 Richard T. Ely Lecture—the major paper given at the American Economic Association meetings—developed a “defense of inequality” that does not explicitly mention, much less analyze, either any of the implicated moral-rights issues or any non-rights-related, distributional-value issues. See Finis Welch, *In Defense of Inequality*, 89 AM. ECON. REV. PAPERS AND PROC. 1 (1999). In fact, although this paper gives some attention to changes in the empirical differences between the compensation of males and females, of people of “European” and “African” descent, of White and Black women, and of White and

stricted to the relevant individuals' scholarly activities. In my experience, the vast majority of economists and law-and-economics scholars also conflate the economic efficiency of a policy option with its social desirability when testifying before Congress, state legislatures, and administrative agencies—that is, in such non-scholarly venues, they also recommend policies solely on the basis of those policies' economic efficiency.

One might argue that these practices involve no more than semantic errors—that the economists and law-and-economics scholars who write and talk in this way really know that the economically efficient choice is not always the choice required by our rights-commitments or the choice that is best, all things considered, including distributional values and sometimes economic efficiency. But few economists and virtually no law-and-economics scholars admit the

---

Black men, *id.* at 6-11, it says nothing about the possible value significance of such differences or the circumstances in which they would or would not have some moral significance. Although Welch's Article does not use the expression "economic efficiency" and makes reference to several possible effects of inequality—for example, on marriage and crime—whose importance the author may not value solely for economic-efficiency reasons, its sections on the consequences of inequality and its concluding policy comments make no explicit or implicit reference to moral norms. Specifically, Welch makes no reference to either the moral norms I denominate "moral principles," which I believe are relevant to moral-rights analyses, or the moral norms I denominate "personal ultimate values," which I believe are relevant to moral-ought analyses.

I admit that some economists who think that economic efficiency cannot be defined non-arbitrarily assume that policies should be evaluated in terms of their impact on a "social welfare function" that does not reflect economic efficiency alone. However, this approach is uncommon in the law-and-economics literature, derives from an incorrect assumption that the concept of "the effect of a choice on economic efficiency" cannot be defined non-arbitrarily, and in practice conceals as much as it illuminates. This last claim reflects the fact that the economists who use this "social welfare function" approach tend to use incorrect definitions of "the effect of choice on economic efficiency," frequently misunderstand the relationship between the effect of a choice on economic efficiency and its impact on total utility, typically ignore the substance of the relevant fairness or justice norms, and misanalyze the relationship between the justness or fairness of a choice and its moral permissibility or overall desirability. More specifically, at least some of the relevant scholars (1) appear to think that justice or fairness judgments reflect the personal ultimate values of those who make them and (2) appear to assume that the effectuation of these norms has the same prescriptive moral relevance as the satisfaction of other types of preferences, tastes, or desires (for example, of the desire for strawberry ice cream). Thus, according to some of these scholars, the fact that a choice effectuates a society's moral-rights commitments increases social welfare, independent of its other consequences, to the extent that, but only to the extent that, in so doing, it yields utility to, or increases the "well-being" of, those individual members of the society who value that norm. As Part IV argues, this account is fundamentally at odds with the role that fairness norms play in prescriptive moral evaluations in rights-based societies. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 969-70, 980, 982, 1021-38 (2001) [hereinafter Kaplow & Shavell, *Fairness Versus Welfare*]. In any event, contrary to the claims I have often heard economists make orally and on four occasions have seen them express in unpublished referees' reports and comments on colleagues' manuscripts, I do not think that the use of social welfare functions to evaluate policies significantly undercuts the importance of analyzing the claims that have been made for the relevance of economic-efficiency conclusions for prescriptive moral evaluations and legal arguments.

limited relevance of economic-efficiency conclusions in print. In fact, several highly respected economists and law-and-economics scholars have written well-known articles that make arguments purporting to justify the claim that economically efficient decisions are always just and/or desirable—arguments that they have not explicitly disavowed and that no other economist has refuted.<sup>4</sup>

Moreover, even if those economists and law-and-economics scholars whose writing and speech conflate “maximizing economic efficiency” with “securing the social optimum” know better in one sense, I suspect that their semantic errors take hold of them psychologically. I will admit, *ad arguendo*, that if they took the trouble to think about these issues, many of them would acknowledge the possibility that, under some conditions, an economically efficient choice might not be morally permissible (that is, consistent with our rights-commitments) or desirable overall. However, even if they would, these scholars still habitually assume that those conditions are not fulfilled in the cases with which they are concerned. In addition, even if economists never deceive themselves, their misuses of language are socially costly because they tend to induce public officials to base their decisions exclusively on economic-efficiency considerations. In my judgment, economists have had a considerable impact of this kind in the United States. They have encouraged American legislators at

---

4. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter *Efficiency Norm*]. Although Judge Posner has never explicitly disavowed this position, he *may* no longer subscribe to it. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998). I use the word “may” because, in this later Article, Posner may be admitting no more than that the economist *qua* economist cannot demonstrate that “a society’s ultimate goal” should be to promote “growth, equality, happiness, survival, conquest, stasis, [and] social justice.” *Id.* at 1670. He may continue to believe that each of these goals or a maximand in which they are arguments would be best promoted by economically efficient choices. The set of well-known economists who have explicitly asserted the proposition delineated in the text (though their arguments for this conclusion differ from Posner’s) include J.R. Hicks in *Foundation of Welfare Economics*, 49 ECON. J. 696 (1939); Harold Hotelling in *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242 (1938); and Mitchell Polinsky in *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407, 407-12 (1972).

Posner’s argument in his HOFSTRA Article and the different arguments made by Hicks, Hotelling, and Polinsky will be delineated and critiqued in the text below. Admittedly, more recently, two respected economists (one of whom is also a lawyer) have argued that, at least when evaluating tax policy, it may be optimal to take the distribution of utility (as opposed to its maximization) and hence more than economic efficiency into account. However, these scholars still reject the relevance (and perhaps even the coherence [meaningfulness]) of fairness norms that do not focus on utility. See Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3; Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) [hereinafter Kaplow & Shavell, *Should Legal Rules Favor the Poor?*]; Louis Kaplow & Steven Shavell, *Why The Legal System Is Less Efficient Than The Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter Kaplow & Shavell, *Legal System*].

all levels of government to analyze and justify their decisions exclusively in economic-efficiency terms; persuaded President Reagan to promulgate an Executive Order requiring administrative agencies to reject all new and old regulations that do not pass an economic-efficiency-based cost/benefit test;<sup>5</sup> and encouraged some judges to base some of their decisions on economic-efficiency considerations in cases in which the internally right answer to the relevant legal-rights question was not the economically efficient answer.<sup>6</sup> For this reason, my critique of the positions to which so many economists and law-and-economics scholars appear to subscribe is not academic in the pejorative sense of that adjective.

I actually believe that many economists do not understand the limited relevance of economic-efficiency conclusions, that most economists who in one sense do understand this fact habitually ignore it, and that economists have misled many public decision makers into exaggerating the importance of economic efficiency. However, even if I am wrong on all of these issues, this Article is justified because it corrects two deficiencies in the literature:

- (1) No one has ever carefully or correctly analyzed the relevance of economic-efficiency conclusions to prescriptive moral and legal-rights analyses; and
- (2) The economics and law-and-economics literature contains several incorrect arguments on these issues made by highly regarded economists or law-and-economics scholars. These arguments have never been disavowed by their authors or adequately criticized by anyone else.

This Article's analysis is presented in four parts and an appendix. Part I outlines various accounts of prescriptive moral discourse, both generally and in the United States particularly. Part II outlines various accounts of legitimate<sup>7</sup> and valid<sup>8</sup> legal argument in the United

---

5. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (1988). Although President Clinton issued an Executive Order requiring administrative agencies to "assess all costs and benefits," to choose the regulatory approach that "maximize[s] net benefits," and to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," Exec. Order No. 12,866 § 1(a), (b)(5)-(6), 3 C.F.R. 638-39, *reprinted in* 5 USC § 601 note (1994), Clinton's Order made clear that the benefits to be considered include many "gains" that are not or may not belong to the set of equivalent-dollar gains on which traditional cost/benefit analysis focuses: for example, "distributional impacts," "equity," and "environmental" and "public health and safety" gains that may not be measured in traditional cost/benefit terms. *Id.* § 1(a), 3 C.F.R. 639.

6. See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558, 569 (9th Cir. 1974); *Saint Barnabas Med. Ctr. v. Essex County*, 543 A.2d 34, 43 (N.J. 1988) (Pollock, J., concurring).

7. In my terminology, the use of an argument to determine what the law is or what the substance of a particular legal-rights conclusion is is said to be "legitimate" or "morally legitimate" if it is consistent with the relevant society's moral commitments.



States as well as various related conclusions about whether internally right answers (unique answers derivable from valid legal argument) exist in the United States. Next, Part III demonstrates that, regardless of which defensible account one gives of prescriptive moral argument, economic-efficiency arguments generally are not algorithms for generating prescriptive moral conclusions of any kind. More specifically, Part III justifies this conclusion by pointing out that economic-efficiency analysis cannot determine the set of people who count, is insensitive to many distinctions that play a crucial role in moral-rights analysis, and does not consider the independent relevance to “moral-ought evaluations” of what I call “distributional values,” which always play a major role—indeed, for some, play an exclusive role—in “moral-ought” analysis. Part III also states and criticizes (1) four arguments that economists and law-and-economics scholars have made to justify their claim that economic-efficiency analysis is an algorithm for the generation of moral-rights conclusions and (2) two arguments that economists have made to support the conclusion that economic-efficiency analysis is an algorithm for the generation of all, or at least most, moral-ought conclusions. Finally, Part IV demonstrates that, regardless of which contemporaneously supported position one takes on legitimate and valid legal argument in the United States, economic-efficiency analysis rarely provides “internally right” answers to legal-rights questions in the United States, independent of whether the legal right in question derives from an independent moral right, was created to implement some “personal ultimate value(s)” or defensible concrete policy goals, or was created to secure economic rents for its beneficiaries. The APPENDIX sketches six arguably different methodologies that philosophers use to analyze prescriptive moral questions and explains why my critique of the claims economists have made for the prescriptive moral relevance of economic-efficiency conclusions does not depend on the correctness of the “qualified conventionalist” approach that I take to prescriptive moral analysis.

---

8. In my terminology, the use of an argument to determine what the law is is “valid” or “legally valid” if that use is relevant in determining, within the society concerned, the internally correct answer to the legal-rights question under investigation. A textual argument may be legally valid and a related legal-rights conclusion may be internally correct even though they are morally illegitimate if the textual argument focuses on a Constitutional text (1) whose concrete implications were understood by its ratifiers and (2) that is inconsistent with the moral commitments of the society that promulgated it. Of course, if the relevant Constitutional provision were socially important, the failure of the society in question to remove it would call into question that society’s moral integrity.

## I. PRESCRIPTIVE MORAL EVALUATION

Two types of prescriptive moral discourse can be distinguished: Moral discourse about what someone or the State is morally *obligated to do* and moral discourse about what someone or the State morally *ought to do*. These two types of discourse differ in four ways. First, in cultures that clearly distinguish these two types of discourse, they involve different moral norms. For convenience, I will denominate the moral norms used in moral-rights discourse “moral principles” and the different moral norms used in moral-ought discourse “personal ultimate values.”

Second, in cultures that clearly distinguish the two types of discourse, they sometimes yield “conflicting” conclusions. In a given situation, a moral agent may have no obligation to do something that from various legitimate personal-ultimate-value perspectives he or she ought to do. And less often, a moral agent may have an obligation to do something that, from some personal-ultimate-value perspective that is legitimate within its appropriate domain, she ought not do.

Third, in “rights-based” societies,<sup>9</sup> not only are moral-rights conclusions clearly distinguished from moral-ought conclusions but moral-rights conclusions trump moral-ought conclusions when the two conflict. Conversely, moral-ought conclusions trump moral-rights conclusions in “goal-based” cultures. Goal-based cultures consider moral-rights discourse as essentially the same as moral-ought discourse—that is, references to “moral rights” indicate only that the speaker feels strongly about the relevant conclusion and/or is certain that it is correct. In goal-based cultures, “moral rights” are valued solely as the handmaidens of “moral oughts.” In other words, in goal-based societies, moral rights are recognized or enforced only if their recognition or enforcement promotes the goal the society is committed to maximizing.

Fourth, and finally, although in rights-based cultures most individual or State choices do not implicate rights—that is, most choices are neither required by nor prohibited by the rights of any rights-bearing entity—all moral choices can be analyzed from the perspective of personal ultimate values.

---

9. For a discussion of the distinctions among “rights-based,” “goal-based,” immoral, and amoral societies, see RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 13-34 (1998) [hereinafter MARKOVITS, MATTERS OF PRINCIPLE], and Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415, 417-23 (1999) [hereinafter Markovits, *Internally-Right Answers*]. For analytic purposes, I would classify (1) societies in which religious-right or religious-duty conclusions trump individually-held moral-ought conclusions as a variant of rights-based societies and (2) ideal-based societies, in which the effect of a choice on the extent to which some ideal is secured trumps all other considerations, as a variant of “goal-based” societies.

Societies of moral integrity<sup>10</sup> can be either rights-based or goal-based. The members of particular rights-based societies can be committed to basing their moral-rights evaluations and moral-rights-related conduct on any one of a number of different moral norms.<sup>11</sup> Members of both rights-based and goal-based societies can individually or personally subscribe to any or a combination of a wide variety of moral norms.

#### A. *Moral-Rights Argument in the United States*

I believe that the United States is a rights-based State—that is, that this society draws a strong distinction between moral-rights analysis and moral-ought analysis and commits itself to the proposition that moral-rights conclusions trump moral-ought conclusions when the two conflict. Although Part III could focus, *inter alia*, on the relevance of economic-efficiency conclusions to generic moral-rights analysis, and Part IV could focus, *inter alia*, on the relevance of economic-efficiency conclusions to moral-rights-related legal-rights analysis in any rights-based society, I will focus on the relevance of economic-efficiency conclusions for the particular types of moral-rights analysis and moral-rights-related legal-rights analysis to which Americans are committed.

I have developed elsewhere detailed protocols for determining whether a given society is goal-based, rights-based, amoral, or immoral as well as for determining the particular moral norm (the basic moral principle) that underlies the rights of rights-bearing entities in

---

10. Societies of “moral integrity” are societies whose members and State conform their behavior to the moral norm to which they are committed to a difficult-to-specify requisite extent. Amoral societies have no moral commitments. Immoral societies are committed to effectuating a decision principle that is intrinsically immoral. Obviously, this last statement reflects my belief that the notions “moral” and “immoral” have some essentialist content.

11. This proposition and several others in the text that follows are admittedly contestable. Disagreements about them partly reflect disagreements about the methodology one should use to investigate the prescriptive moral issues they implicate. Although this Article is not the place for a full discussion of the relevant methodological debate, the APPENDIX will provide sketches of some of the more important methodologies that different philosophers use to investigate prescriptive moral issues. Philosophers who think that there are universally binding norms of justice and use methodologies that are designed to discover these norms (methodologies that are said to be “foundationalist” in the broader sense of that term) will reject the statement in the text to which this footnote is attached. Philosophers who do not think that there are universally binding norms of justice (including “conventionalists,” who focus on describing the moral practices of particular communities) will be willing to accept the proposition that different communities may be committed to different norms of justice. The APPENDIX provides brief (admittedly contestable) sketches of four arguably different approaches to justice or moral-rights analysis that are foundationalist in the broader sense of that expression as well as accounts of two versions of conventionalism, which admittedly occupy extreme positions on the possible conventionalist continuum.

a given rights-based society.<sup>12</sup> I have also detailed protocols for determining the characteristics that make a creature a rights-bearing entity in a particular rights-based society.<sup>13</sup> These protocols have led me to conclude that American society is a liberal, rights-based society.

When I say the United States is a “liberal,” rights-based society, I mean that it is committed to

(1) Classifying as moral-rights-bearing all creatures who have the neurological prerequisites to become or remain individuals of moral integrity<sup>14</sup>—that is, to take their moral obligations seriously and to attempt to make their lives conform with the personal ultimate values to which they subscribe; and

(2) Treating all rights-bearing entities for which it is responsible with equal, appropriate respect and (derivatively) showing appropriate, equal concern for their actualizing their morally critical potential to lead lives of moral integrity.<sup>15</sup>

In general, moral-rights arguments aim to discover the conclusion that will maximize the net rights-related interests of all relevant moral-rights holders. These arguments involve a balancing approach quite different from the type of non-rights-oriented, consequentialist balancing employed by some American courts. In a liberal, rights-based State, moral-rights arguments attempt to determine the conclusion that best promotes relevant moral-rights holders’ interest in being treated with equal, appropriate respect and concern.

It may be helpful to concretize this abstract discussion by delineating a few of the more concrete moral rights that moral-rights holders have in a liberal, rights-based State. More specifically, in a liberal, rights-based culture, a private choice violates a moral-rights holder’s right to appropriate, equal respect if it manifests prejudice against him, disrespect for him based on his morally irrelevant personal attributes or group membership,<sup>16</sup> or a desire to hurt him for no particular reason at all. Relatedly, a State choice violates a moral-rights holder’s right to appropriate, equal respect if it manifests prejudice against him; hurts him for no good reason; fails to secure his rights-related interests when the choice does not promote rights-

---

12. MARKOVITS, MATTERS OF PRINCIPLE, *supra* note 9, at 13-34.

13. *Id.* at 35-39.

14. For a detailed discussion of the concept of “being a person of moral integrity,” see *id.* at 39-41.

15. *Id.* at 41-44.

16. As would many failures to keep promises made to him or decisions by an actor that would create a risk that someone else might suffer an accident-loss or pollution-loss that the actor in question would not have made had he placed the same weight on the average net equivalent-dollar loss his choice imposed on others as on the average net equivalent-dollar gain it secured for him.

related interests on balance; fails to give him the opportunity to participate appropriately in various legislative, executive, and judicial decisionmaking processes; or officially endorses a particular view of the first-order good.<sup>17</sup> Also relatedly, a liberal, rights-based State may violate a moral-rights holder's right to appropriate, equal concern by failing to ensure that he can make meaningful life choices.<sup>18</sup>

### *B. Moral-Ought Arguments*

This section analyzes the structure and possible content of moral-ought arguments. Regardless of whether a society's moral-rights commitments require or preclude the choice under consideration or regardless of whether the society has any moral-rights commitments, a person can always analyze whether, from some personal-ultimate-value perspective, he ought to make or reject the choice. Nevertheless, to increase the salience of the discussion that follows, I will focus on moral-ought arguments in a liberal, rights-based society like the United States. I want to emphasize, however, that most of what follows also applies to goal-based societies and non-liberal, rights-based societies.

#### *1. The Non-Liberal Moral Norms (Personal Ultimate Values) That Play a Role in "Moral-Ought" Evaluations: A Partial List and Comparison With the Liberal Basic Moral Principle*

The liberal basic moral principle I have articulated differs substantially from the various norms that I think members of our society use, either separately or in combination, when making and evaluating "moral-ought statements." Thus, the liberal moral norm differs from the classical utilitarian norm, which evaluates any claim or act according to the effect of its recognition or commission on the total

---

17. It is appropriate for a liberal, rights-based State to endorse the second-order good of an individual's living a life of moral integrity.

18. That is, by failing to provide the moral-rights holder with the minimum real income he needs both to reach the point at which he can think about the good and (in our kind of society) to have the self-respect necessary to take his life morally seriously; by failing to put him in a position to have a range of experiences that enable him to make meaningful value and life choices; by failing to provide him with an education that enables him to think critically and that informs him of a variety of ethical and life-style alternatives; by failing to prevent others, including his parents, from limiting his information-base unacceptably or from constricting his psychological ability to exercise autonomy; by failing to protect his privacy, because privacy fosters integrity by giving the actor the opportunity to contemplate, to enter into intimate relationships, and to reduce the cost of experimentation; by failing to preserve and foster in other ways the actor's ability to enter into and maintain intimate relationships, which often lead to self-discovery and enable their participants to instantiate their values; and by failing to protect various other liberties whose exercise enables an actor to instantiate his or her values when such protection can be provided without sacrificing weightier rights-related interests of others. For a more detailed analysis of the concrete implications of a liberal, rights-based society's duties of equal, appropriate respect and concern, see *id.* chs. 3-4.

utility experienced by all entities whose utility counts. It also differs from the “modern” utilitarian norm, which evaluates a choice by its impact on the average utility experienced by all entities whose utility counts. Admittedly, like the liberal principle, these utilitarian norms can be described as egalitarian, in their case because they treat all entities whose utility counts as equals by giving the same weight to each unit of utility (by not making the value of a unit of utility depend on the identity or history of the entity experiencing it). However, utilitarian norms differ from liberal norms because they proceed from a different assumption about the attributes of an entity that cause the entity to be rights-bearing or of moral concern. In particular, utilitarian norms implicitly assume that the ability to experience utility is critical to the moral status of an entity while, as we saw, the liberal norm assumes that the possession of the neurological prerequisites for becoming or remaining an individual of moral integrity is the relevant defining characteristic.

The liberal moral norm also differs from the equal-utility egalitarian norm, which values the moral worthiness of a claim or the moral desirability of an act by the impact of its recognition or commission on the equality of the utility experienced by each moral-rights holder. The liberal moral norm differs as well from each of the various non-liberal equal-opportunity egalitarian norms, which value the worthiness of a claim or choice by the impact of its recognition or commission on the inequalities of the opportunity that different moral-rights holders have to do things other than actualize their potential to become and remain individuals of moral integrity—for example, the opportunity they have to develop certain mental or physical skills or to perform certain valued social roles.

Once more, like the liberal principle, the equal-utility and non-liberal equality-of-opportunity norms can be described as egalitarian because, as their very names suggest, they treat individuals as equals by deeming the recipient’s identity and behavioral history irrelevant to the evaluation of his or her experiencing utility or receiving various opportunities. However, both these norms differ from the liberal norm because they implicitly reject the liberal assumption that the defining characteristic of an entity is its potential to become or remain an individual of moral integrity. These norms differ from each other with respect to the metric by which their holders define a life’s success. Supporters of the equal-utility norm measure a life’s success by the utility the relevant entity experiences. In contrast, supporters of the non-liberal equal-opportunity norm assume that an individual does something uniquely valuable when he makes good use of the particular type of opportunity that such evaluators want to be equally available to all and measure the suc-

cess of a life by the extent to which an individual took advantage of the opportunity or set of opportunities they value.

The liberal principle differs as well from the equality-of-resources norm, which values a claim or an act by the impact of its recognition or commission on the equality of the resources—which are measured in allocative-cost or “opportunity cost” terms—available to moral-rights holders. This equality-of-resources norm resembles the liberal principle in two ways. First, it is egalitarian because it renders irrelevant the identity and the history of each moral-rights holder. Second, it allows individuals to select their own metric of success. However, the equality-of-resources norm also differs from the liberal principle in two respects. First, it differs in the metric it implicitly adopts for a “life’s success”—presumably something like the extent to which an individual achieves his concrete goals. Second, it differs in its particular concern with the resource constraint as opposed to the taste-of-the-community constraint on the success of an individual’s life as it defines this concept.

Finally, the liberal moral norm differs from the various norms that different libertarians endorse. Libertarianism differs from liberalism most clearly on distributional justice issues and may also be associated with a broader definition of liberty than liberalism would countenance. In particular, unlike liberals, libertarians assume that each moral-rights holder deserves the resources he would have if they were obtained through behavior that did not directly violate anyone’s rights—for example, by earning or producing them,<sup>19</sup> finding them, obtaining them through luck in general, or receiving them as a gift or bequest. Moreover, libertarianism may be more likely than liberalism to concede both the right of individuals to indulge their prejudices in various contexts and the right of some individuals, such as parents, to limit the information on which others, such as their children, can base their life choices.

## 2. *The Structure of Moral-Ought Arguments*

Like all moral-rights arguments, all moral-ought arguments must begin by determining the creatures whose positions ought to be considered. After this so-called “boundary condition” issue is resolved, moral-ought arguments diverge into two families.

The first type of moral-ought argument proceeds by estimating the equivalent-dollar gains and losses each choice-option will generate, placing norm-derived weights on these equivalent-dollar gains

---

19. For a discussion of the ambiguity of the phrase “what someone produces” and my reason for concluding that the libertarian distributional premise that “people ought to receive, or are entitled to receive, what they produce” either is conceptually morally mistaken or is based on blatantly false empirical assumptions, see *id.* at 50-53.

and losses, and choosing the option that maximizes the total positive difference between weighted equivalent-dollar gains and weighted equivalent-dollar losses. The set of norms that can best be effectuated in this way includes (most obviously) norms that focus on the maximization and/or distribution of utility—paradigmatically, utilitarianism and equal-utility egalitarianism, but also variants of other norms that focus on whether individuals receive the utility that their conduct implies they deserve. However, the set of norms that can best be effectuated through this type of argument also includes norms that value the equivalent-dollar effects on a choice for reasons unrelated to its impact on the affected individuals' utility—for example, norms that value the tendency of a choice to produce equivalent-dollar effects that equalize the availability of some opportunity to relevant individuals, or that provide one or more individuals with a specific opportunity for reasons unrelated to the utility that anyone will obtain from these individuals' exercising the opportunity. This first type of moral-ought argument has eight steps:

- (1) Determine the set of moral-rights holders.
- (2) Determine whether a particular choice is required or prohibited by the rights of any moral-rights holder. If a particular choice is required by our rights-commitments, then that choice ought to be made. If a particular choice is prohibited by our rights-commitments, then the rest of the protocol must be followed to determine which non-proscribed choice ought to be made. If a particular choice is neither required by nor prohibited by our rights-commitments, then the rest of the protocol must be followed to determine which choice ought to be made.
- (3) Use economic-efficiency analysis to predict the equivalent-dollar gains that each morally permissible change from the status quo will confer on its beneficiaries and the equivalent-dollar losses it will impose on its victims.
- (4) Specify the personal ultimate value or personal-ultimate-value combination on which the relevant moral-ought conclusion will be based—*inter alia*, specify the facts that the value in question makes germane to any consideration of the distributional desirability of the choice in question.<sup>20</sup>

---

20. A number of facts may be relevant to the distributional desirability of a choice, including the characteristics of the welfare positions and/or general conduct of the beneficiaries and victims; the moral characteristics of any acts to which the private or government choice in question is responding; and the characteristics of any indirect consequences that the relevant private or government choices may have. Thus, for utilitarians and various kinds of egalitarians, the relevant facts will include such items as the distribution of the beneficiaries' and victims' pre-choice wealth and incomes. For those libertarians who believe that people ought to be paid according to what they produce, the relevant facts will include such items as the relationship between the beneficiaries' and victims' pre-policy



(5) Collect the facts that the above value or value-combination deems relevant to the distributional desirability of the choice in question.

(6) Use the value specification in (4) and the facts in (5) to generate weights to be attached to the average equivalent-dollar gain and average equivalent-dollar loss yielded by each morally permissible change from the status quo.

(7) For each relevant change from the status quo, calculate the weighted equivalent-dollar gains the change would generate, the weighted equivalent-dollar losses the change would generate, and the difference between them.

(8) Evaluate all changes according to the net weighted equivalent-dollar effect of each: more specifically, recommend the change with the highest positive net weighted equivalent-dollar gain or recommend no change if all changes would yield lower net weighted equivalent-dollar gains than losses. The evaluator should be indifferent to making a change that yields equal net weighted equivalent-dollar gains and losses.

The second type of moral-ought argument proceeds from values that cannot be effectuated most desirably by predicting and placing weights on equivalent-dollar gains and losses. Some of these values (many of which are religious) focus on the intent of the actors to bring about certain consequences that are perceived to be bad in themselves for reasons that do not focus on their net equivalent-dollar impact. Moral-ought evaluations that proceed from such values start with the same two steps with which the first type of moral-ought argument began and then proceed as follows:

(3) Specify the personal ultimate value or personal-ultimate-value combination on which the relevant moral-ought conclusion will be based.

(4) Collect the facts that the above value or value-combination deems relevant.

---

wealth and incomes and their respective “allocative products” (the allocative value of the labor of either the last person or the average person who did their type of work with equal industriousness and skill). And for liberals, the relevant facts will include such items as the relationship between the number of people the private or government choice will enable to become and remain individuals of moral integrity by raising their material welfare, and the number of people the choice will prevent from becoming and remaining individuals of moral integrity by reducing their material welfare. Similarly, for retributionists and individuals who believe that people should not profit from their own wrongs, the relevant facts would include whether any acts to which a relevant private or government choice responds were inherently immoral.

(5) Use the relevant value or value-combination to assess the desirability of each morally permissible choice.

(6) Recommend the most desirable choice.

## II. LEGITIMATE AND VALID LEGAL ARGUMENT IN A LIBERAL, RIGHTS-BASED STATE SUCH AS THE UNITED STATES

The nature of the arguments that are legitimate and valid legal arguments will vary across different types of moral cultures and, quite possibly (with legal practice), among cultures of the same moral type. Although I certainly could analyze the relevance of economic-efficiency conclusions and economic-efficiency analysis for the determination of legal rights in general, I think it more instructive to do so for the various types of legal rights that can exist in liberal, rights-based societies such as the United States. I recognize that the structure of legitimate and valid legal argument in the United States varies with the type of legal right being asserted. I also acknowledge that many experts doubt that legal arguments can be legitimate or valid in the senses in which I use these terms and that some experts who agree that my abstract accounts of these concepts are coherent and applicable to legal argument in the United States disagree with my conclusions about the varieties of legal argument that are legitimate in the United States.<sup>21</sup> Some also disagree with my claim that arguments of moral principle normatively dominate legal argument in the United States.<sup>22</sup> I will discuss the positions of various scholars who disagree with my account of legitimate and valid legal argument in the United States and discuss my own position on these issues to put myself in a position to demonstrate that my critique of the claims that have been made for the relevance of economic-efficiency argument for legal-rights argument and legal-rights conclusions does not depend on the correctness of my jurisprudential views.

### A. *Legal-Rights Analysis in the United States*

#### 1. *My Position on Legitimate Legal Argument, Valid Legal Argument, and the Existence of Internally Right Answers to Legal-Rights Questions in the United States*

My basic jurisprudential position can be summarized in the following way:

---

21. See *infra* text accompanying note 25.

22. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); J.M. Balkin and Sanford Levinson, *Getting Serious About "Taking Legal Reasoning Seriously,"* 74 CHL.-KENT L. REV. 543 (1999).

(1) Using a particular type of argument to determine the content of existing law is morally legitimate in a given culture if and only if doing so is consistent with that culture's moral commitments.

(2) An acceptably thorough analysis of the prescriptive moral discourse and conduct of members of United States society would reveal that America is a liberal, rights-based culture. More specifically, such an investigation would yield the conclusion that ours is a liberal, rights-based culture whose members and State are obligated to show appropriate, equal respect and concern for all moral-rights holders for whom they are responsible.

(3) An appropriate empirical analysis would reveal that, in addition to arguments that employ our society's basic moral principle directly (arguments of moral principle), members of our culture use different sorts of textual, historical, structural, precedential/legal-practice-based, and prudential arguments to determine the content of pre-existing law.

(4) The preceding conclusions imply that in our liberal, rights-based culture the use of a particular type of argument to determine what the law is is morally legitimate if and only if it is consistent with our society's liberal basic moral principle. This implies not only that arguments based on this moral principle are internal to law but that they are also the dominant mode of legitimate legal argument in a rights-based culture. More specifically, arguments of moral principle dominate legitimate legal argument in a rights-based culture in two ways: They operate directly to determine the legitimacy or justness of legal-rights claims that are based on moral rights, and they operate indirectly to determine the legitimacy of the other general modes of argument that members of the relevant culture have used or may use to establish what the law is, the variants of each general type of argument it is legitimate to use to discover the law, and the legitimate relationship between each sub-type of argument that can be legitimately used to discover what the law is and the internally right answer to the relevant legal-rights question.<sup>23</sup>

(5) Cultures that are not amoral or immoral—cultures that have moral integrity—may have constitutions that instantiate their moral commitments less than perfectly. In these cultures, morally legitimate legal argument may diverge from legally valid legal argument. In particular, if such a culture's constitution contains one or more provisions whose text is clearly inconsistent with its moral commitments and whose concrete implications were understood by

---

23. For a detailed account of the indirect roles of arguments of moral principle and an explanation of my claim that those roles favor my conclusion that there are unique, internally right answers to all Constitutional law questions in the United States, see MARKOVITS, MATTERS OF PRINCIPLE, *supra* note 9, at 61-76.

their ratifiers at the time of ratification, argument based on such text will be legally valid. Indeed, it will be legally valid, though morally illegitimate, for such textual arguments to trump arguments of moral principle even though this implies that the internally correct answer to the relevant legal-rights question is inconsistent with the relevant society's moral commitments. Two points should be made about this unpleasant conclusion. First, there are limits to the extent to which a society of moral integrity's constitutional law can be morally illegitimate. Beyond some point, a society's failure to eliminate such illegitimate constitutional provisions will lead to the conclusion that it is not a society of moral integrity. Second, in my judgment, although the pre-Reconstruction United States Constitution contained morally illegitimate slavery clauses and failed to impose constitutional obligations on the states to fulfill their moral commitments, the current United States Constitution does not include any morally illegitimate provisions, though it does include many "stupidities."<sup>24</sup>

(6) Were it not for the possible existence of one or more morally illegitimate constitutional provisions, the fact that arguments of moral principle dominate morally legitimate legal discourse in our culture would imply the existence of internally right answers to all legal-rights questions. Absent any morally illegitimate constitutional provisions, the dominance of arguments of moral principle would produce this result by rendering legally irrelevant (because of their moral illegitimacy) some prudential arguments that favor a different conclusion from the one supported by the other, legitimate modes of legal argument and by co-opting the other modes of legal argument (textual, historical, structural, precedential/practice-based, and one type of prudential legal argument) that might otherwise favor different conclusions or a conclusion that is inconsistent with our basic moral principle.

(7) In fact, the presence of morally illegitimate constitutional provisions does not defeat the conclusion that there are internally right answers to all legal-rights questions in a rights-based culture. In particular, the fact that textual arguments based on morally illegitimate constitutional provisions dominate arguments of moral principle in some constitutional cases does not undermine the internally-right-answer thesis, because in these cases there still is an internally right answer: the morally illegitimate answer favored by the relevant textual argument.

---

24. See CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (WILLIAM N. ESKRIDGE, JR. & SANFORD LEVINSON eds., 1998).

*2. My Position on the Legitimate and Valid Way to Identify Different Types of Legal Rights in the United States*

In the United States, legal rights have diverse origins and diverse moral bases. Thus, a large number of constitutional rights, most common law rights, and some statutory rights simply reflect moral rights rather than any official act by our Founding Fathers or any government they created. Other common law and constitutional rights reflect a combination of the interest of moral-rights holders in being given fair notice and the fact that courts make mistakes when assessing particular legal-rights claims that were based on alleged moral rights. In other words, these rights reflect the fact that a convincing, fair-notice-related moral-rights argument can be made for a doctrine of precedent that legitimizes a court's upholding a legal right that would not have existed in a matter of first impression. Other constitutional rights, as well as most non-constitutional legal rights, were created by constitutional provisions, statutes, regulations, executive orders, or city ordinances that were not required by our moral-rights commitments. The creation of a few of these legal rights secured a moral right that could have been secured in other ways as well. However, most such legal rights were created instead to instantiate ultimate values, to achieve concrete goals, or to generate economic rents for one or more segments of our society's members.

In my view, the internally correct way to discover the law varies with the basis of the legal right that is being alleged. When the legal right at issue purportedly reflects a moral right that pre-exists any official act by the State, then "arguments of moral principle" control the relevant legal-rights analysis both directly and indirectly in the ways previously described.

In contrast, when the asserted legal right does not derive from such a moral right, arguments of moral principle do not play the direct role that they play when it does. However, in these latter cases, arguments of moral principle still play an indirect role. In particular, such arguments still determine the weight courts should give to precedent, whether a court should hold a particular statute or statutory provision void for vagueness, and the legal force that should be given to information about the intent of the legislators who passed a particular statute or the intent of the parties who entered into a (supposed) contract. In general, when the alleged legal right does not derive from a pre-existing moral right, the internally right way to assess the relevant claim is to use:

- (1) Textual arguments that focus on the words of the provision of the law-creating act or contract whose meaning is being disputed; that focus on whether a particular interpretation of the passage

under dispute would render other provisions in the document irrelevant or would contradict those provisions at the level of meaning; whether a particular interpretation of the passage under dispute would balance the values, interests, or goals at stake in the way in which they were balanced by the other provisions of the relevant document; the nature of the document being considered, whether it is a constitution, statute, ordinance, or private contract; the placement of the relevant provision in the document as a whole—for example, whether a disputed provision of a constitution is in a power-creating or power-limiting section of the document and whether a disputed provision in a contract is in a duty-creating or remedial section of the document;

(2) “Structural” arguments, which focus on some fundamental constitutional implications of a society’s moral commitments; some basic features of a government’s constitutional institutional arrangements; the personal ultimate values or concrete goals a particular constitutional provision, statute, or ordinance was designed to achieve; or the concrete goals that led the parties to a contract to participate in the transaction it governs;

(3) “Historical” arguments, which focus on the meaning of the text’s individual words or expressions in the relevant context at the time of the enactment’s passage or contract’s formation; alternative textual formulations that were rejected; the causes of the enactment’s passage or contract’s formation; the content of other decisions made contemporaneously by an enactment’s supporters or a contract’s participants; statements made by an enactment’s supporters or a contract’s participants about the values they were hoping to further, results they were hoping to achieve, or more concrete goals they were trying to secure, etc.; and

(4) Any precedent or interpretive practice that bears on the relevant text’s interpretation.

### *B. Alternative Positions on Legal-Rights Analysis in the United States*

Most legal academics do not accept my position on common law and constitutional interpretation. Their disagreement usually reflects their rejection of my contention that a strong distinction can be drawn between moral-rights and moral-ought discourse; my claim that members of our culture do draw such a distinction and do believe that moral-rights conclusions trump moral-ought conclusions when the two conflict; my contention that, to be morally legitimate, the use of a legal argument in a given culture must be consistent with that culture’s moral commitments; and/or my related argument

that arguments of moral principle dominate legitimate legal argument in our culture.

Those who reject my jurisprudential position subscribe to a wide variety of alternative jurisprudential views. Some of these alternative positions relate specifically to constitutional interpretation, but others apply to common law, statutory, and regulatory rights. Limitations of space preclude me from discussing all the alternatives to my position and from discussing those I do consider in great detail.<sup>25</sup> However, I need to say enough about a sufficient number of them to show that my claim that economic-efficiency analysis is not an algorithm for legal-rights analysis does not depend on the correctness of the jurisprudential position to which I subscribe.

### 1. *Philip Bobbitt*

Philip Bobbitt has argued<sup>26</sup> that legal practice is self-legitimizing; that our culture's legal practice is to discover the law by using different variants of textual, historical, structural, precedent-related, prudential, and what he calls "ethical" argument, which is related to the *ethos* of limited government; that none of these modes of argument dominates; that an internally right answer to a legal-rights question exists if and only if all variants of all these modes of argument that have been employed to a quantitatively significant extent favor the same legal interpretation; that when the different relevant modes of argument or different variants of these modes favor different outcomes, no internally right answer to the legal-rights question at issue exists; and that when no internally right answer to a legal-rights question exists, a judge must follow his conscience to decide the case.

### 2. *Legal Realists*

From a jurisprudential perspective, the Legal Realists are not a uniform group. Some Legal Realists believe no internally right answers to certain legal-rights questions exist because the relevant legal rights turn on the proper interpretation of open-textured language in a constitution, statute, administrative regulation, or judicial opinion whose meaning is critically indeterminate.<sup>27</sup> Other Legal Realists believe that there is no internally right answer to some legal-rights questions because the relevant legal rights turn on legal practice—for example, canons of statutory construction or doctrines of precedent—that are irresolvably and critically internally-

---

25. For a more detailed analysis of a larger set of alternatives to my jurisprudential position, see MARKOVITS, MATTERS OF PRINCIPLE, *supra* note 9, at 90-194.

26. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

27. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1930).

inconsistent.<sup>28</sup> Still other Legal Realists have little interest in whether internally right answers to all legal-rights questions exist. They are interested, rather, in discovering the determinants of the answers that judges give to *intellectually contestable* or *socially contested* legal-rights questions, regardless of whether these questions are *essentially contestable*. Relatedly, they are interested in the most effective way for lawyers to argue cases whose internally correct resolution is contestable or socially contested.<sup>29</sup> Some of these latter Legal Realists provide socio-economic explanations of judicial decisions in such cases. Others emphasize individual, judge-oriented, personal/psychological history or value-preference explanations of judicial decisions. Still others offer explanations of judicial behavior that focus on the general professional socialization of judges and lawyers.<sup>30</sup>

Legal Realists do not explicitly address how judges are obligated to or ought to decide cases that have internally right answers. I suspect that at least some of these scholars believe that judges ought to provide internally correct answers to legal-rights questions when such answers are available. This suspicion is supported by the fact that some Legal Realists, including Karl Llewellyn, have concluded that, when dealing with contract or commercial disputes that cannot be resolved by reference to language alone, judges ought to make the decision that conforms with the relevant sub-community's practice and expectations.<sup>31</sup> To me, this recommendation implies that internally right answers exist to the legal-rights questions concerned. The internally right answer is the answer that is compatible with the legitimate expectations of the parties involved, which in these instances create and are created by the business practices in question. In cases in which Legal Realists believe no internally right answer exists, they seem to think that judges ought to make good policy choices by combining sound social science with personal ultimate values (whose contestability they generally do not mention or explore).

---

28. For a discussion of the canons of statutory construction, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). For a discussion of the doctrines of precedent, see Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Incredible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655 (1999).

29. For an argument that Karl Llewellyn belongs in this category, see Neil MacCormick & Zipporah Batshaw Wiseman, *Llewellyn Revisited*, 70 TEX. L. REV. 771 (1992) (book review). Llewellyn's most famous book is K.N. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

30. For a discussion of these latter variants of Legal Realists, see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

31. This approach is manifest in Llewellyn's work on The Uniform Commercial Code. See also *id.* at 282.



### 3. *Critical Legal Studies*

Unlike Philip Bobbitt and many Legal Realists, members of the Critical Legal Studies (CLS) movement believe that there are internally right answers to few or virtually no legal-rights questions.<sup>32</sup> CLS members also disagree with Bobbitt and the Legal Realists about how judges should respond to legal-rights questions for which there is no internally right answer. Unlike Bobbitt, who thinks that a judge should make use of his own personal ultimate values by exercising his conscience and, unlike the Legal Realists, who paid little attention to the contestability of personal-ultimate-value choices or their individual preference for some values over others, CLS members want judges to instantiate the values the CLS members prefer. Originally, CLS members indicated that the relevant “legal decisions” should be based on a poorly defined mix of equal-resource and equal-opportunity egalitarianism, which they thought socialist political programs could best secure. More recently, CLS adherents have argued that such decisions should be guided by an inadequately specified set of communitarian values. I should admit that CLS members usually do not direct their opinions at judges, probably because their view of law as a weapon of the powerful makes them pessimistic about the likelihood that judges would follow their advice.<sup>33</sup>

### 4. *Legal Pragmatists*

The Legal Pragmatists have not attempted to provide a detailed account of legitimate legal argument. They have confined themselves to claiming that judges should adopt the approach to legal interpretation that “works” in some undefined sense. They argue that attempts to derive answers to particular legal-rights questions from abstract accounts or grand theories of law, or even from such ac-

---

32. In part, their view on this issue reflects their general view that the meaning of language is supplied by its interpreter and not its author. And in part, it reflects their mistaken claim that the proof of two facts can establish the internal inconsistency of Legal Liberalism: first, that the different principles to which Liberal Legalism is committed sometimes favor different outcomes in a given case, and second, that a principle that carries the day in one case fails to do so in another. This claim is mistaken because it ignores two other facts: first, that, unlike rules, which are supposed to be decisive whenever they apply, principles have a dimension of weight, and second, that the relative weights that should be assigned to two or more given principles will vary among the cases to whose resolution they are relevant.

33. A list of the best CLS scholarship would include ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983).

counts of particular fields of law, do not work. What does work, they argue, are approaches that introduce small changes to the law whose consequences can be assessed.<sup>34</sup> The Legal Pragmatists have never specified the criterion or criteria they think should be used to assess whether a particular doctrine works. I suspect that they think that some ultimate-value combination should be used for this purpose. At least, this conclusion is implied by their hostility to grand theory. If they believed that moral-rights claims were essentially different from moral-ought claims and that at least some legal decisions were supposed to protect moral rights and can be assessed by what I call moral principles as opposed to ultimate values, they would not be so hostile to the genre of grand theory that attempts to give an account of the principles of justice our society has committed to instantiating: if moral rights were relevant, a decision that implicates them could not “work” unless it secured justice.

### 5. *Ronald Dworkin*

Ronald Dworkin seems to think that legal interpretation sometimes should be dominated by moral-principle analysis and sometimes by a kind of ultimate-value analysis.<sup>35</sup> I do not agree with Dworkin’s account of legitimate legal interpretation. To my mind, his use of a “best light” criterion to assess candidates for our society’s “basic moral principle” title (my language, not his) undermines the strong distinction between what I call “moral principles” and “personal ultimate values.” His argument that to be a community of principle, or to have moral integrity, a society must consistently implement some individual ultimate value or specifiable combination of ultimate values unjustifiably anthropomorphizes the concept of “the moral integrity of a State.” Dworkin’s conception of “a society of integrity” is unjustifiable in part because, as social-choice theory teaches, group decisions will often be inconsistent from any value-perspective despite the fact that each member of the group has voted perfectly consistently. However, for current purposes, the critical point is that, on Dworkin’s account, the internally right answer to legal-rights questions (1) sometimes depends on a moral principle of “equal respect and concern” similar to the basic moral principle on which I claim our society is committed to grounding its moral rights

---

34. The best discussion of Legal Pragmatism I know is Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996). For several other useful examples or discussions of Legal Pragmatism, see Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

35. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

discourse and conduct and (2) sometimes depends on the ultimate values that the State has consistently tried to instantiate.<sup>36</sup>

#### 6. *John Hart Ely*

John Hart Ely maintains that judicial interpretation of the fundamental-fairness clauses in the United States Constitution should be limited to protecting certain values he claims the Constitution's text indicates are constitutionally fundamental—rights to fair judicial process, rights to fair political representation, and the right of minorities not to be disadvantaged by a lack of a fair share of political power. According to Ely, judges should reject all other constitutional rights claims in the service of the value of popular sovereignty, majoritarianism, or democracy (a value whose basis and content he fails to examine).<sup>37</sup> I do not think that Ely's reading of the Constitution is persuasive or that his conclusion is correct. For present purposes, however, it suffices to note the process values and substantive values he thinks should dominate constitutional interpretation.

#### 7. *Legal Historians of Ideology*

Other legal academics claim that a review of the historical evidence on the ideological commitments of Americans in the second half of the eighteenth century implies that the United States Constitution should be held to instantiate civic-republican, communitarian, or libertarian values.<sup>38</sup> Once more, although I disagree both with their historical conclusions and with the constitutional conclusions they base on them, for present purposes the relevant point is their conclusion that communitarian or libertarian values should dominate constitutional interpretation.

#### 8. *Strict Constructionists*

The final jurisprudential position I will mention is the strict constructionists' position on constitutional interpretation. According to the strict constructionists, courts should hold State choices unconstitutional only if they contravene the self-declaring meaning of the Constitution's text or the concrete interpretive expectations of

---

36. For a more detailed comparison of Dworkin's position to my own, see MARKOVITS, *MATTERS OF PRINCIPLE*, *supra* note 9, at 91-109.

37. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-02 (1980).

38. For a discussion of the relevance of civic-republican and communitarian values to constitutional interpretation, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993). For the possible relevance of libertarian values to Constitutional law and common law interpretation, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), and Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978).

the text's ratifiers.<sup>39</sup> In all other cases, judges should hold State choices constitutional. Once more, this conclusion is said to be justified by our supposed (unexamined) commitment to popular sovereignty, majoritarianism, or democracy.

I do not agree with this position. No text has self-declaring meaning. The Framers did not think,<sup>40</sup> and our general social practice does not suggest, that interpreters of this kind of document should be bound by its drafters' and ratifiers' specific expectations. Judicial review is not inconsistent with our commitment to democracy, which is a corollary of the same liberal basic moral principle from which our other substantive and process rights derive. For present purposes, however, the critical point is the substance rather than the persuasiveness of strict constructionism.

### III. ECONOMIC-EFFICIENCY ANALYSIS AS AN ALGORITHM FOR GENERATING MORAL-RIGHTS AND MORAL-UGHT CONCLUSIONS IN A LIBERAL, RIGHTS-BASED SOCIETY

#### A. *Economic-Efficiency Analysis as an Algorithm for Generating Moral-Rights Conclusions in a Liberal, Rights-Based Society*

This section argues against the claim that economic-efficiency analysis is an algorithm for generating moral-rights conclusions in a liberal, rights-based society. It establishes this conclusion by demonstrating that economic-efficiency analysis is insensitive to four issues or distinctions that sometimes play a critical role in moral-rights analysis. It also explains why the four arguments that some economists have offered to establish their contrary conclusion that economic-efficiency analysis is an algorithm for the generation of moral-rights conclusions in our culture cannot bear scrutiny.

##### 1. *The Insensitivity of Economic-Efficiency Analysis to Considerations That Play Crucial Roles in Some Liberal, Moral-Rights Analyses*

Four deficiencies of economic-efficiency analysis are relevant in the current context. First, economic-efficiency analysis can provide no insight into the defining attributes of moral-rights holders. It cannot identify the creatures or entities that have rights-related interests; indeed, it cannot even establish its own boundary condition (cannot help the economist identify the creatures or entities whose equivalent-dollar gains and losses or revealed preferences count for

---

39. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019 (1992).

40. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

economic-efficiency-analysis purposes). Second, economic-efficiency analysis does not distinguish between prejudices and other tastes. Third, economic-efficiency analysis does not distinguish between (1) a party's psychological or material welfare interest or concern in an event, decision, or piece of information and (2) its "entitlement" interest or concern in the relevant matter. And fourth, just as economic-efficiency analysis cannot solve the boundary condition issue, it cannot reveal the basis of our negative rights and positive rights.<sup>41</sup> The last three of these deficiencies are interconnected: all relate to the fact that economic-efficiency analysis is insensitive to the liberal duties of respect and concern.

The inability of economic-efficiency analysis to identify whose interests count precludes such analysis from generating moral-rights conclusions whenever those conclusions turn on whether a particular creature is a moral-rights holder—for example, whether a fetus or one of its precursors is a moral-rights holder in an abortion or in tort cases, whether someone in an irreversible coma is a moral-rights holder, or whether members of future generations are moral-rights holders. The fact that economics does not distinguish prejudices from other tastes causes the economically efficient conclusion to diverge from the conclusion that would secure the relevant parties' moral rights in a liberal, rights-based society in cases that involve discrimination<sup>42</sup> in which the discriminators do not have the right to engage.<sup>43</sup> This deficiency would therefore be critical in those slavery cases, school-segregation cases, large-firm employment discrimination cases, and segregative zoning cases in which the operative prejudices made the relevant discrimination economically efficient. The insensitivity of economics to the moral status of the various kinds of "welfare interests" that individuals may have in particular subjects or outcomes may cause the economically efficient conclusion to diverge from the conclusion that would secure the rights of the relevant individuals in cases in which someone has a psychological or material welfare interest that our moral commitments imply should be given no weight or even a negative weight. Cases involving parties—such as peeping Toms or readers of gossip columns—who place a high equivalent-dollar value on information that is none of their legitimate concern fall into this category. Indeed, in such cases, the reference to "weights" is actually misleading: the securing and/or "publication" of the information in question should rather be said to

---

41. That is, the positive rights that individuals have to certain resources or opportunities.

42. In the pejorative sense of the word.

43. There are situations in which individuals do have a moral right to indulge their prejudices. For example, individuals are entitled to base their choice of a spouse, *inter alia*, on their prejudices.

be impermissible because it violates the privacy interest of the party to whom the information pertains. Economic-efficiency analysis would also fail to yield correct moral-rights conclusions on this account when the issue is the right of an individual to engage in conduct he finds attractive because he places a high equivalent-dollar value on inflicting pain on or degrading a moral-rights holder.

The inability of economics to determine whether a possible moral-rights holder has a positive right to something makes economic-efficiency analysis an unsuitable surrogate for moral-rights analysis whenever the force of the argument for securing a moral-rights holder's right is not captured by the equivalent-dollar value that the relevant beneficiary places on the good or service in question. This deficiency of economics is relevant not only (as we have just seen) when assessing the moral rights of the potential victim of a wealthy sadist but also when assessing the positive right of a potential moral agent to the resources he requires to become and remain an individual of moral integrity, regardless of whether he is mentally or physically handicapped.

*2. Four Erroneous Arguments That Underlie the Mistaken Conclusion That Economic-Efficiency Analysis Is an Algorithm for the Assessment of Moral-Rights Claims*

Obviously, the various individual scholars whom I would classify as supporters of standard law-and-economics do not make all the errors that this section attributes to members of their group. Nevertheless, I believe that most economists and lawyer-economists who claim that the analysis of economic efficiency provides an algorithm for the "correct" resolution of all moral-rights claims subscribe to this position because they accept the first erroneous argument as well as one or more of the second through fourth erroneous arguments detailed below.

The first argument in question is negative. It responds to my kind of critique of the claim that economic-efficiency analysis is an algorithm for moral-rights analysis by rejecting as incoherent<sup>44</sup> my account of our society's moral-rights discourse. Admittedly, proponents of this argument fall into two camps. Some believe that the very concepts "fairness," "justice," and "moral rights" (as opposed to my conceptions of them) are incoherent. Others believe that these concepts (as opposed to my conceptions of them) have a coherent meaning that is compatible with their claim that economic-efficiency analysis is an algorithm for moral-rights analysis.

---

44. That is, lacking objectively ascertainable denotative meaning.

Numerous discussions that I have had with economists who take this position have led me to conclude that their belief that my conception of moral-rights argument is incoherent reflects their broader view that, to be coherent, an argument must contain only non-contestable, mechanically ascertainable critical concepts and must require no conceptually contestable balancing of considerations (paradigmatically, should involve the derivation of conclusions from a mathematical formula).<sup>45</sup> I do not deny that one could make other arguments for the proposition that my kind of account of moral-rights discourse is essentially non-sensical. Philosophers such as A.J. Ayer<sup>46</sup> and psychologists such as B.F. Skinner<sup>47</sup> have done so. However, their conclusion is now rejected by philosophers such as Rawls and Dworkin, who argue that meaningful, consistent, complementary reasons whose point is revealed by normative theory can establish moral-rights conclusions and that moral argumentation is capable of providing reasons as opposed to mere inclinations or tastes for action.<sup>48</sup>

The next three relevant arguments are positive: They attempt to justify the claim that economic-efficiency analysis is an algorithm for generating moral-rights conclusions by demonstrating that economic-efficiency analysis will always yield just conclusions. The first contains the following two premises:

- (1) The decision that maximizes the total utility of all moral-rights holders is the just decision, the decision that secures the relevant parties' moral rights; and
- (2) Given the impossibility of making interpersonal comparisons of utility, it is appropriate to assume that the equivalent-dollar gains

---

45. I have had to rely on discussions with economists rather than on arguments they have published because the economists who take the position I am now addressing do not argue for it in print—they either assert it without justification or (worse yet) simply assume it to be true. For a recent example in which two highly respected law-and-economics scholars (a lawyer-economist and a lawyer) simply assert the incoherence of fairness arguments that do not focus on the maximization or distribution of utility or welfare in an Article that purports to demonstrate the irrelevance of such fairness considerations, see Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3. Admittedly, Kaplow and Shavell have a second (equally indefensible) reason for concluding that fairness should be ignored—namely, that even if fairness notions have denotative meaning, their consideration would not lead an evaluator to alter his conclusions.

46. A.J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1952).

47. B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971).

48. My treatment of the negative argument just discussed in the text has profited from my reading of Benjamin C. Zipursky, *Should Tort Professors Use Only Welfarist Concerns? A Commentary on Kaplow and Shavell's "Principles of Fairness v. Human Welfare,"* (2001) (unpublished manuscript, on file with author).

and losses a choice generates will be associated with equal average utility gains or losses.<sup>49</sup>

Neither of the premises can bear scrutiny. Even if one ignores the problematic character of mapping the various affective experiences that human beings have<sup>50</sup> into utility; the difficulty that utilitarians have in justifying any boundary condition that limits the creatures whose utility counts to human beings;<sup>51</sup> the fact that utilitarianism implies that the moral quality of any individual's conduct is essentially irrelevant to the amount of resources he ought to receive (though it may be relevant for instrumental reasons); and the related fact that utilitarianism does not take the distinction between individuals seriously, no foundationalist, Aristotelian, or constructivist argument has established the objective correctness of utilitarianism. Furthermore, no conventionalist argument can establish its internal correctness, since members of our culture do not decide moral-rights or justice questions by applying a utilitarian standard. Among other things, utilitarianism does not capture our moral practices because it does not distinguish between moral-rights discourse and moral-ought discourse and because it fails to make the intentionality of actors directly relevant to the right answer to any moral-rights question one could pose about their position.

Moreover, even if the internally right answer to any relevant moral-rights question were always the answer that maximized *utility*, the answer to those questions that maximized *economic efficiency* would not be the internally right answer to such questions. Certainly, a contrary conclusion cannot be established by citing the supposed impossibility of making interpersonal comparisons of utility.

Such an argument fails for two reasons. The first is admittedly contestable. I reject the premise that it is impossible to make interpersonal comparisons of utility. Certainly, we at least purport to make such comparisons frequently. Thus, we say that Ed is happier than Dick. We give a particular gift to Mary rather than to Jane be-

---

49. Richard Posner made this standard economics argument in the first edition of his famous book. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 241 (1973). I have heard many economists make precisely the same argument. I write "I have heard" because economists articulate this assumption orally rather than in print. For a discussion of economists' historic belief in the impossibility of making interpersonal comparisons of utility, see I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 13 (2d ed. 1950). Admittedly, Kaplow and Shavell operate on the assumption that interpersonal comparisons of utility are possible and recognize that, from various value-perspectives that cannot be dismissed as incoherent or objectively wrong, it may be desirable to focus on the distribution of utility for reasons that are at least partially unrelated to its maximization. See Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3.

50. For example, ecstasy, happiness, satisfaction, pleasure, displeasure, pain, dissatisfaction, depression, and terror.

51. For example, a boundary condition that excludes non-human animals who can experience "utility."



cause we think Mary will get more pleasure from it. Or we decide to invite Ted and Alice rather than Bob and Carol to a dinner party because we think that the couple Ted and Alice will enjoy it more than the couple Bob and Carol, that our other guests will get more pleasure from interacting with Ted and Alice than from interacting with Bob and Carol, or that the party will maximize the utility of its participants taken as a group if Ted and Alice are invited. Of course, we may be fooling ourselves when we make such calculations and statements: the kinds of evidence we use to make and evaluate the relevant claims<sup>52</sup> may not in fact be adequate for the purpose. However, I do not see how one can hold such a position without lapsing into solipsism: that is, if the kinds of evidence to which I have referred do not justify conclusions about the affective states of other minds, I do not understand the basis on which one can presume that other minds exist.

The second reason that the “impossibility of making interpersonal comparisons of utility” argument fails is that, contrary to its second premise, it is not appropriate or neutral to assume that the average equivalent-dollar gained by a choice’s beneficiaries and the average equivalent-dollar lost by a choice’s victims involve the same absolute change in utility for the party in question. This equal-average-utility assumption is arbitrary and counterintuitive, not neutral and appropriate. For both reasons, therefore, I do not think that one could establish the universal, objective, or internal correctness of the most economically efficient resolution of a moral-rights issue by citing the supposed impossibility of making interpersonal comparisons of utility—even if utilitarianism did capture the universally binding norm justice or our society’s justice conception.

The second positive argument that has led many economists to conclude that economic-efficiency analysis is an algorithm for the generation of moral-rights conclusions contains the following two premises:

- (1) Justice is an increasing function of the extent to which a variety of liberal principles (in my terminology, more concrete corollaries of the basic liberal principle) and personal ultimate values are secured; and
- (2) Decisions that increase economic efficiency increase the extent to which these various principles and values that are constitutive

---

52. For example, evidence that relates to facial expressions, tone of voice, demeanor in general, our own assessments of our own experience, and the reports others give of their experiences.

of justice are secured, in comparison with the status quo ante, to a far greater extent than is generally recognized.<sup>53</sup>

I have two objections to this argument. First, I do not think that the argument's definition of justice<sup>54</sup> either has been established by any (narrowly-defined) foundationalist, Aristotelian, constructivist, or natural law argument or captures our moral-rights practices. Second, even if the argument's first premise correctly formulates the universally binding concept of justice, or our society's conception of justice, and even if its second premise correctly asserts that economically efficient decisions increase the extent to which the principles and values that are arguments in its conception of justice are secured in comparison with the status quo ante,<sup>55</sup> this argument would not justify the conclusion that economically efficient decisions promote justice as formulated as much as some other, less-economically-efficient decision might do.

The third positive argument that has led some economists to conclude that economically efficient decisions are always just is an argument from hypothetical consent.<sup>56</sup> They contend that:

- (1) Economically efficient decisions, or at least a broad subset of such decisions including virtually all the kinds of common law decisions judges must make, are in everyone's *ex ante* interest;
- (2) Everyone would, therefore, consent to such decisions *ex ante* if given the opportunity to do so;
- (3) The making of economically efficient decisions is therefore consistent with, perhaps is required by, our commitment to autonomy; and

---

53. Richard Posner basically made this argument in Posner, *Efficiency Norm*, *supra* note 4.

54. The argument defines justice as a function whose value increases with the extent to which a variety of liberal moral principles and personal ultimate values are secured. Note the mathematical character of the first premise's definition of justice.

55. Indeed, even if such decisions increase the extent to which the relevant principles and values are secured to a far greater extent than is generally recognized.

56. Admittedly, some proponents of this argument may not take it to be a separate argument for the justness of economically efficient decisions. In particular, although none of the relevant scholars has even made this point, some scholars who make the hypothetical-consent argument may find it salient because they believe that (1) if it could be shown that hypothetical consent would be given to all economically efficient policy choices, that demonstration would establish that economically efficient policies would always protect the autonomy interests of those they affect, and (2) autonomy is one component of the kind of envelope concept of justice that they, as well as proponents of the second positive argument just described, adopt. I should also admit that something like this hypothetical-consent argument may be playing a role in the third positive argument to be discussed in the text—namely, that all economically efficient choices ought to be adopted because a rule requiring them to be made would move the economy to a Pareto-superior position in the long run. However, the importance of consent arguments in philosophical debate has led me to consider this “hypothetical-consent” argument separately here.

(4) Our conception of justice makes autonomy paramount.<sup>57</sup>

Three objections can be made to this argument. The first is probably the least important in this context: Even if, as I believe, one secures justice by making those choices that maximize moral-rights-related interests on balance, and even if, in a liberal, rights-based society, the basic duty of respect generally implies that each competent moral-rights holder has a *prima facie* right to develop his own conception of the good and to act on that conception constrained only by the moral rights of others, the liberal, rights-based State's commitment to autonomy will not imply that it is bound to allow individuals to make all choices they desire when their choice does not disserve the moral-rights-related interests of others. For example, a liberal, rights-based State is not obligated to allow the moral-rights holders for whom it is responsible to sell themselves into slavery, to take addictive drugs that will cause them to lose their autonomy, or to enter into various kinds of relationships that seem highly likely to cost them their autonomy. Nor, I suspect, is it required to allow them to ride motorcycles without wearing helmets, even if no one else will be affected by their avoidable injury.

The second and third objections to the argument from hypothetical consent are more important in the current context. The second objection argues that the autonomy argument from consent requires actual consent, not hypothetical consent. The fact that someone would have consented to something if given the opportunity to do so is not an adequate predicate for concluding that his autonomy interests are furthered by holding him to a deal or arrangement to which he did not consent. For example, the fact that on Monday an individual would have accepted a deal or arrangement or policy that will harm some people *ex post* because at that time he did not know whether he would be an *ex post* beneficiary or victim of the choice in question does not in itself bind him to accept it on Wednesday, when he knows its actual results. Admittedly, the features of the policy that would have led him to accept it on Monday may provide a basis for the conclusion that the policy in question was just. However, any argument that relies on those features is not a consent argument.

Third, even if hypothetical consent would establish the justness of any policy, the "hypothetical consent" argument would not establish the justness of the overwhelming majority of economically efficient choices of any kind because neither economically efficient choices in general nor the economically efficient resolution of common-law-rights questions are likely to leave everyone better off *ex ante* while

---

57. This argument is best articulated by RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 92-99, 101-03 (1981).

leaving no one worse off *ex ante*. Proponents of the hypothetical-consent argument<sup>58</sup> have vastly overestimated the frequency with which economically efficient policies will leave all those they affect better off *ex ante*. In my judgment, economically efficient policies will virtually always have one or more *ex ante* losers.

Richard Posner, the major proponent of the hypothetical-consent argument for the justness of all economically efficient choices, has tried to respond to this reality, whose empirical importance he vastly underestimates, by insisting that “only a fanatic would insist that unanimity be required” in this context.<sup>59</sup> In fact, however, for consent arguments to work, there must be unanimity. In this context, fanaticism is the order of the day. In short, none of the arguments for the supposed justness of economically efficient decisions or for the incoherence of the concept of justice can bear scrutiny.

*B. Economic-Efficiency Analysis as an Algorithm for Generating Moral-Ought Conclusions in a Liberal, Rights-Based Society*

Economic efficiency is not the only personal ultimate value on which moral-ought evaluations are based. In fact, economic efficiency is not even a personal ultimate value: we do not value greenbacks or greenback equivalents in and of themselves. Nor is there any reason to believe that the things that we do value are monotonically related to economic efficiency. For these reasons, it would be extremely surprising if the analysis of economic efficiency were an algorithm for generating moral-ought conclusions in our culture. This section elaborates on this point by examining in more detail the ability of economic-efficiency analysis to generate the same conclusions as the two types of moral-ought arguments previously distinguished. This section also criticizes two arguments that some economists claim justify their conclusions that economic-efficiency analysis is an algorithm for the generation of all non-tax-policy moral-ought conclusions.

---

58. Posner cites “implied warranties of habitability” decisions as an example of economically inefficient, common law decisions that leave everyone worse off *ex ante*. *Id.* at 102. My own study demonstrates that those decisions will leave the members of some groups *ex ante* better off and the members of other groups *ex ante* worse off in circumstances in which the individuals in question will be able to determine *ex ante* the group to which they belong. Richard S. Markovits, *The Distributive Impact, Allocative Efficiency and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976). I have no doubt that this is the case for most common law decisions, and *a fortiori* for public policy choices in general.

59. POSNER, *supra* note 49, at 97.

*1. Three Reasons Why Economic-Efficiency Analysis Is Not an Algorithm for the Generation of Moral-Ought Conclusions in Our Culture*

For at least three reasons, economic-efficiency analysis cannot serve as an algorithm for the generation of moral-ought conclusions in our culture. First, economic-efficiency analysis cannot identify the creatures whose positions we ought to consider. Second, even if, contrary to fact, the first point could be ignored and economic-efficiency conclusions were always identical to utilitarian conclusions, economic-efficiency analysis could not serve as an algorithm for the generation of all moral-ought conclusions in our society because many such evaluations are made from a value-perspective that is either not exclusively utilitarian or not utilitarian at all. This fact is salient because the non-utilitarian values in question will not always favor economically efficient decisions. Thus, it will usually not be economically efficient to give everyone the same amount of resources since, from the perspective of economic efficiency, doing so will distort the incentives of individuals to invest in their human capital, to do the type of labor that is most economically efficient for them to perform, and to work as long and as assiduously as would be economically efficient. For the same reason, it will usually not be economically efficient to distribute resources so as to equalize the utility that all individuals obtain from them or that all individuals experience altogether. It will also not be economically efficient to give everyone the same opportunities. For example, since a decision to allow some individuals to perform a socially valued task will usually be less economically efficient than a decision to allow other individuals to do so, the effectuation of this variant of the equal-opportunity norm will usually be economically inefficient. As Part IV will suggest, the same conclusion will hold for many types of libertarian norms. Third, even if one could ignore the first, boundary-condition issue and all moral-ought evaluations were based purely on utilitarianism in our culture, economic-efficiency analysis could not serve as an algorithm for the generation of all moral-ought conclusions in our culture because the choice that maximizes economic efficiency is not generally the choice that maximizes utility. Thus, a choice to shift from a less economically efficient option to the most economically efficient option will decrease utility if the marginal utility of money over the relevant range to the shift's victims is sufficiently higher than the marginal utility of money over the relevant range to the choice's beneficiaries. For example, a choice that increases economic efficiency by giving its beneficiaries the equivalent of a \$100 gain while imposing the equivalent of a \$50 loss on its victims will decrease utility if the utility-value of

the average equivalent-dollar lost is more than twice the utility-value of the average equivalent-dollar gained.<sup>60</sup>

*2. A Critique of Two Arguments That Some Economists Believe Establish the Ability of Economic-Efficiency Analysis to Serve as an Algorithm for Generating All, or Most, Public Policy Moral-Ought Conclusions in Our Culture*

*a. A Critique of the Argument That All Economically Efficient Decisions Ought to Be Made Because Making Them Will Bring the Economy to a Pareto-Superior Position.*—Some economists believe that economic-efficiency analysis' ability to generate all relevant moral-ought conclusions can be established by an argument based on the following two premises:

- (1) Any decision that moves the economy to a Pareto-superior position (that makes somebody better off without making any one worse off) ought to be made; and
- (2) A policy of making all economically efficient decisions will, over the long haul, make some people better off and no one worse off than they would be if all economically efficient decisions were rejected.<sup>61</sup>

Unfortunately, this argument cannot bear scrutiny: both its premises are wrong, and, even if they were right, they would not establish its conclusion.

The first premise is wrong because, from some legitimate personal-ultimate-value perspectives,<sup>62</sup> some moves to Pareto-superior positions may be morally undesirable.<sup>63</sup> The second premise is empirically wrong because, given the fact that individual economically efficient decisions may have substantial, adverse distributional effects on some of their victims, even over the long haul a decision to make all economically efficient decisions might not move the society to a position that is Pareto-superior to the status quo ante.

Moreover, even if the two premises of this argument were correct, the argument would not justify the conclusion that the economically efficient choice always ought to be made, because, from various personal-ultimate-value perspectives, one or more moves that are not

---

60. As might occur if the relevant beneficiaries are rich while the relevant victims are poor.

61. See Hicks, *supra* note 4; Hotelling, *supra* note 4. See also Polinsky, *supra* note 4, at 407-12.

62. For example, from the standpoint of retributionist values or, more generally, values that require rewards or material welfare to match the quality of the relevant actor's moral performance in general.

63. For example, choices that benefit a heinous criminal and harm no one in any straightforward sense.

Pareto-superior in comparison with the status quo ante may be preferable to a move that is Pareto-superior in comparison with the status quo ante.

*b. A Critique of the Double-Distortion Argument Argument.*—The “Double-Distortion Argument” argument demonstrates that, transaction-cost considerations aside, it will always be more economically efficient to redistribute income from members of one earned-income class (the disfavored earned-income class) to members of another earned-income class (the favored earned-income-class)<sup>64</sup> by making taxes vary appropriately with their earned incomes rather than by making (1) the prices the government charges for the various goods and services it sells vary with the earned income of the buyer, (2) the legal liability and damage rules courts use to resolve legal rights disputes vary with the relative earned incomes of the plaintiffs and defendants, or (3) the size of the civil fines the government imposes on a wrongdoer vary with his earned income. Any decision of the latter sorts would disserve the goal of maximizing economic efficiency if it is viewed in isolation. More specifically, the “Double-Distortion Argument” argument maintains that this conclusion is justified because, administrative-transaction-cost considerations and other Pareto imperfections aside, taxes on earned income cause economic inefficiency solely by distorting the incentive to perform market labor, as opposed to performing untaxed do-it-yourself labor or consuming untaxed leisure, while the pricing policies and legal rules listed above distort two kinds of choices on these assumptions—namely, they distort both the choice to consume the relevant product or engage in the relevant injurious conduct and (derivatively) the choice to perform market labor. Proponents of the Double-Distortion Argument argument correctly point out that those who advocate redistributing income between earned-income classes by making the prices, damage awards, and civil fines an individual must pay an explicit function of his earned income when such policy choices would cause economic inefficiency by distorting purchasing and injurious-

---

64. Louis Kaplow and Steven Shavell wrote the first Article to be published in a law-and-economics journal on the prescriptive-moral implications of the Double-Distortion Argument. See Kaplow & Shavell, *Legal System*, *supra* note 4, at 669. However, essentially the same argument was made earlier in two Articles (one of which Shavell wrote on his own) in economics journals. See Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes But Not Program Choice or Design*, 79 SCANDINAVIAN J. OF ECON. 264 (1979); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414 (1981). For some later usages of this argument, see Louis Kaplow, *The Optimal Supply of Public Goods and the Distortionary Cost of Taxation*, 49 NAT'L TAX J. 513, 517 (1996); Louis Kaplow & Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 744 n.99, 745 n.102 (1996). For Kaplow and Shavell's most recent defense of their position, see Kaplow & Shavell, *Should Legal Rules Favor the Poor?*, *supra* note 4.

conduct decisions have ignored the fact that such policies will have the same distorting effect on the relevant individual's market-labor/do-it-yourself labor/leisure incentives and choices as would an earned-income tax that generated the same redistribution.

The Double-Distortion Argument actually does justify the following, relatively unimportant proposition: if transaction-cost considerations do not undermine this conclusion and taxes on earned income are not only the more economically efficient way to redistribute income between earned-income classes but the more desirable way to do so from the relevant personal-ultimate-value perspective, one always ought to redistribute income between *earned-income* classes exclusively by varying tax rates on earned income appropriately when this option is politically available.

However, many economists and law-and-economics scholars seem to believe that the Double-Distortion Argument implies the correctness of two more ambitious prescriptive moral conclusions. First, that legislators and others—such as administrative rulemakers—who exercise legislative power ought never try to redistribute income by adopting economically inefficient policies other than taxes on earned income. Second, that judges and others making adjudicative decisions ought never sacrifice economic efficiency to instantiate distributional norms or achieve distributional goals other than by enforcing statutes that impose taxes on earned income.<sup>65</sup>

At least six objections can be made to these two propositions and/or to the claim that the Double-Distortion Argument warrants them.<sup>66</sup> First, these propositions ignore the fact that even if one can instantiate a given distributional value to the relevant desired extent least economically inefficiently by varying earned-income tax rates exclusively, that conclusion does not guarantee that such an earned-income tax policy will be more desirable from the relevant value-perspective than all its alternatives. The greater economic efficiency of a policy does not guarantee its greater moral desirability.

Second, even if one could instantiate a given distributional value to the relevant desired extent not only least economically inefficiently but also most desirably by varying earned-income tax rates exclusively, that fact would not warrant the conclusion that other methods of effectuating the relevant distributional value to the de-

---

65. These propositions are implied by Kaplow and Shavell's claim that "normative economic analysis of legal rules should focus [exclusively] on [economic] efficiency." Kaplow & Shavell, *Should Legal Rules Favor the Poor?*, *supra* note 4, at 821.

66. I will treat these objections only briefly here. For a more detailed discussion, see Richard S. Markovits, *Sacrificing Economic Efficiency to Effectuate Distributional Values: A Critique of Kaplow and Shavell's Conclusions About the Prescriptive-Moral Import of the Double-Distortion Argument* (2000) (unpublished manuscript, on file with author).



sired extent ought to be rejected if the earned-income tax-rate policy is politically unavailable.

Third, even if an appropriate earned-income tax policy would be able to effectuate a given distributional value to the desired extent least economically inefficiently and most desirably if transaction-cost considerations were ignored, the transaction-cost considerations might make it more economically efficient and/or more desirable to use some other policy that does generate a double distortion to instantiate the value in question. For example, if it were more transaction-costly to determine earned income directly with various degrees of accuracy than to determine one or more other things that are highly correlated with earned income with some relevant degree of accuracy, it might be more economically efficient and more desirable overall to effectuate the valued redistribution by taxing something other than earned income or promulgating or enforcing some economically inefficient legal rule than by taxing earned income.

Fourth, since an individual's richness or poorness depends not only on his earned income but also on his unearned income and wealth,<sup>67</sup> taxes on earned income will not be able to effectuate perfectly distributional values that essentially favor redistributions between income/wealth classes. In the unlikely event that there is no correlation between an individual's earned income and his income/wealth position, taxes on earned income may have no useful role to play in effectuating this kind of value. Even if (as I believe) such a correlation exists, it may be desirable to redistribute income from the richer to the poorer or between income/wealth classes, *inter alia*, by levying taxes on investment income and wealth, despite the fact that such taxes will generate double distortions by distorting savings/consumption/current and future gift-giving/"bequesting" choices as well as market-labor/do-it-yourself labor/leisure choices. Admittedly, however, this criticism could be viewed as a friendly amendment to the Double-Distortion Argument argument for relying exclusively on taxes to redistribute income from the rich to the poor or vice versa, an amendment that simply requires the relevant argument to be relabeled a Extra Distortion Argument argument. This admission reflects the fact that any attempt to redistribute resources from the rich to the poor or vice versa by making prices, liability rules, damages, or fines depend on the relevant party's or parties' income/wealth positions when it is not economically efficient to do so will misallocate resources not only by distorting their (1) market-labor/do-it-yourself labor/leisure choices and (2) savings/consumption/current and future gift-giving/"bequesting" choices

---

67. As well as on his disabilities, his health, the quantity of his leisure, the intrinsic attractiveness of his labor, and various other attributes of his person and situation.

but also by distorting their (3) product-purchasing, tort-avoidance, contract-violation, etc., choices.

Fifth, even if the Double-Distortion Argument (or its Extra-Distortion Argument analogue) did demonstrate that redistributions between income/wealth classes can be effectuated not only least economically inefficiently but also most desirably through the exclusive use of taxes on earned income, unearned income, and wealth and even if such a tax policy were politically available, those facts would not imply that one ought not use other policies that would yield double or extra distortions or misallocate resources for other reasons to effectuate other kinds of distributional norms that do not essentially favor redistributions between income/wealth classes. This latter category of norms includes norms that relate to the positive rights that moral-rights holders possess, corrective-justice norms, and various other kinds of distributional norms such as libertarian distributional norms that, roughly speaking, value people's receiving incomes that match their moral deserts and are essentially indifferent to the shape of the income/wealth distribution that results.

And sixth, at least in rights-based societies in which adjudicators are morally obligated to resolve the legal-rights claims before them in a way that is not internally wrong,<sup>68</sup> adjudicators will be morally obligated to, and virtually always ought to,<sup>69</sup> enforce statutorily created or constitutionally created legal rights that legislators or constitutional ratifiers created to redistribute income to their beneficiaries. I should add that all adjudicators will have such moral obligations even when the relevant provision cannot be justified in any principled way so long as it does not violate anyone's rights directly (for example, by manifesting a prejudice). Hence, the Double Distortion Argument does not justify the conclusion that public decision makers ought never try to redistribute income by means other than varying the tax rates to be applied to earned income. In many situations, from various value-perspectives, public decision makers ought to redistribute income in ways that generate double (or extra) distortions or cause greater misallocation for other reasons per dollar transferred than taxes on earned income (earned income, unearned income, and wealth) would cause for the average dollar they transferred.

---

68. If my belief that there are internally right answers to all legal-rights questions in a rights-based culture is correct, the text should read "in the internally correct way."

69. Obviously, this judgment reflects my own personal ultimate values. It also reflects my assumption that the relevant society is a society of moral integrity and that the internally correct answer to the legal-rights question before the court is not critically affected by a provision in the society's constitution that is inconsistent with its moral commitments and whose implications were reasonably well understood by its ratifiers.

### 3. *Contributions of Economic-Efficiency Analysis*

Part III has argued that economic-efficiency analysis is not an algorithm for moral-rights analysis or moral-ought analysis. However, I do not want to leave the impression that economic-efficiency analysis or economics in general cannot make a significant contribution to prescriptive moral analysis. I will therefore conclude by briefly listing and illustrating three kinds of contributions that economics can make to these types of inquiries.

First, as I have already suggested, in many situations economic-efficiency analysis can play a useful role in pure utilitarian evaluations or in evaluations that are partially based on utilitarian values. This claim reflects my belief that it will often be more desirable from many legitimate value-perspectives to generate utilitarian conclusions circuitously—by predicting the equivalent-dollar gains and losses different choices will generate and the average utility the relevant winners will obtain and losers will lose per equivalent dollar they respectively win or lose—than directly by focusing straightforwardly on the effect of the choices under consideration on total utility.

Second, as I have also already suggested, economics can sometimes reveal ambiguities in the formulation of particular values, facts that call those values into question, and weaknesses in arguments that employ particular values. Thus, economics can demonstrate that those who believe that “people ought to receive resources equal in value or proportionate to what they produce” need to indicate whether the referent of “what they produce” is an individual’s marginal revenue product, marginal allocative product, the average revenue product of all equally skilled and assiduous workers to perform that individual’s type of labor, or the average allocative product of all members of this class of workers, because these concepts not only differ definitionally but also tend to have very different empirical values in the real world. Economics can also show that the claim that individuals ought to receive or are entitled to receive resources equal in value to what they produced in any of these senses is called into question by the fact that an individual’s product in any of these senses is a function not only of genetic and nurturing factors over which he had no control but also of various “non-personal” factors over which he had no control: the tastes of members of his community; the number of others who are able to perform the type of labor he would find most attractive to perform, all things considered; the opportunity cost to those others of performing this type of labor; the “availability” of complements to the labor inputs he can supply or to the goods and services he can produce; and, perhaps most damningly, the distribution of income in his community

Relatedly, economics can reveal the implicit assumptions in normative distributional arguments. For example, economics reveals that the argument that the value “people ought to be paid according to what they produce” implies that the government ought not redistribute income implicitly assumes either (A) (1) that this value asserts that people ought to be paid their marginal allocative products and (2) that the Pareto imperfections our economy contains do not cause people to be paid more or less than their marginal allocative products or (B) (1) that this value asserts that people ought to be paid in proportion to their average allocative products, marginal resource products, or average resource products and (2) that for some fortuitous reasons their earned income would follow this pattern if government made no effort to redistribute income.

Similarly, economics reveals that liberals who accept the dualist position that the moral obligations of individuals when acting in their private capacities are different from their moral obligations when acting in their political capacities may conclude that potential accident or pollution-loss injurers and victims are obligated to make those avoidance choices and only those avoidance choices they would make if they counted others’ net equivalent-dollar losses as their own—those choices that the type of analysis that would be third-best-allocatively-efficient for them to execute would conclude would be economically efficient for them to make. (The analysis that would be third-best-allocatively-efficient *for them* to execute would depend among other things on the multiplicity of Pareto imperfections in the system, the cost *to them* of collecting data on those imperfections of varying degrees of accuracy, and the cost to them of executing relevant theoretical analyses of different quality.)

Third and finally, in a world in which the evaluator does not have the option of eliminating all the distributional imperfections in his society, Second-Best Theory<sup>70</sup>:

---

70. The General Theory of Second Best demonstrates the following proposition: Given a series of conditions whose fulfillment guarantees the achievement of an optimum, if one or more of those conditions cannot be fulfilled, there is no general reason to believe that reducing the number of remaining optimal conditions that are not fulfilled or the extent to which they are not fulfilled will even tend to bring one closer to the optimum. The intuitive explanation for this conclusion is that, in general, the imperfections one can eliminate will be as likely to counteract as to compound the net effect of the imperfections that one cannot or will not eliminate. Second-Best Theory does not counsel despair. In addition to explaining why one cannot assume, without further argument, that policies that reduce the number or extent of imperfections in a system will improve outcomes if some imperfections remain, it provides insight into the structure that arguments must have to justify the conclusion that in a particular case a policy that decreases (or, for that matter, increases) a particular relevant imperfection will tend to improve outcomes. Economists usually employ The General Theory of Second Best to determine whether a policy that will reduce the extent of so-called Pareto imperfections will tend to increase economic efficiency. But its basic point and implications apply *mutatis mutandis* when the goal is to increase the effectuation of some distributional norm rather than to increase economic efficiency and the

(1) Can teach him that, unless he can devise an appropriate argument to the contrary, choices that reduce or eliminate one or more distributional imperfections without eliminating them all will be as likely to worsen the distribution of income from his value perspective as to improve it; and

(2) Can reveal the structure of the analysis he will have to execute to determine whether in any given case choices that reduce or eliminate a particular distributional imperfection or, indeed, that increase or introduce a particular distributional imperfection, will improve the distribution of income from his perspective.

#### IV. ECONOMIC-EFFICIENCY ANALYSIS AS AN ALGORITHM FOR GENERATING INTERNALLY CORRECT LEGAL-RIGHTS CONCLUSIONS IN A LIBERAL, RIGHTS-BASED CULTURE

Part II's analysis of legal rights indicated that some legal rights are moral-rights-related, some are created by State acts designed to instantiate a particular ultimate value, an ultimate-value combination, or set of morally defensible concrete goals, and some are generated by State choices that were designed to provide economic rents for their beneficiaries or were made for other more or less dubious reasons. Part II also indicated that the assessment of moral-rights-related legal rights claims is controlled by the moral principles to which our society is committed and that the assessment of legal rights claims that are based on State law-creating acts designed to effectuate one or more personal ultimate values or defensible concrete goals is controlled by the substance of the ultimate value(s) or concrete goals in question if the relevant law-creating texts properly reflect their ratifiers' intent but may also depend on canons of statutory interpretation when the relevant texts are imperfectly drafted. Finally, Part II indicated that the interpretation of State law-creating acts that reflected rent-seeking or other dubious types of State law-creating choices will also involve textual and other kinds of legal arguments that are neither moral-principle-oriented nor personal-ultimate-value-oriented. Most important for present purposes, Part II also revealed that the preceding general conclusions are not

---

imperfections in the system are distributional imperfections rather than Pareto imperfections. For the initial formal statement of The General Theory of Second Best, see Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). For a general analysis of the implications of Second-Best Theory for law-and-economics, see Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3 (1998). For a critique of the various justifications that economists and law-and-economics scholars typically offer for ignoring Second-Best Theory, see Richard S. Markovits, *Second-Best Theory and the Obligations of Academics: A Reply to Professor Donohue*, 73 CHI.-KENT L. REV. 267 (1998).

particularly sensitive to one's conclusions about legitimate legal argument in our culture.

A. *When the Internally Right Answer to the Legal-Rights Question Is Moral-Principle-Based Because the Relevant Legal Right Derives from a Moral Right*

I believe that most common law, many constitutional law, and some statutory rights are moral-rights-based and that decisions about legal rights claims that are based on moral rights turn on moral-rights analysis. Although others think that I exaggerate the frequency with which arguments of moral principle control legitimate legal rights argument directly<sup>71</sup> and/or that I have misidentified the moral principle our society is committed to instantiating in its moral-rights discourse,<sup>72</sup> supporters of a wide variety of jurisprudential positions support the view that, in at least some cases, arguments of moral principle directly determine the internally right answer to the legal-rights question at issue.<sup>73</sup> More specifically, Philip Bobbitt, some Legal Realists such as Karl Llewellyn, Ronald Dworkin, John Hart Ely, and many legal historians of ideology would support this conclusion.

Of course, the issue with which we are currently concerned is not whether these experts believe that the internally right answers to some moral-rights-related legal-rights questions are controlled by moral principle but whether the instantiation of the various moral principles they think are controlling is consistent with economic efficiency. To analyze this issue, I will first comment on the substance of the various moral principles that the legal experts in question believe control the internally right answer to some legal-rights questions and then examine the compatibility of these particular moral principles with economic efficiency.

Of the legal experts who accept that moral principle controls the internally right answer to at least some moral-rights-related legal-

---

71. I believe that scholars who claim that I exaggerate the extent to which arguments of moral principle control legitimate legal-rights argument do so at least in part because they fail to note that my claim relates to *normative* domination, not actual domination (note the word "legitimate" in its articulation). I admit that, given the "conventionalist" character of my approach to moral and legitimate legal argument, a demonstration that arguments of moral principle do not actually dominate legal argument in the sense in which I claim it normatively dominates legal argument counts against my normative domination claim, though the force of such evidence is weakened by the fact that the conventionalist approach I believe is warranted is "qualified" in the APPENDIX. For a debate in which the distinction between normative and actual domination plays a central role, see Balkin & Levinson, *supra* note 22; Richard S. Markovits, "You Cannot Be Serious!": A Reply to Professors Balkin and Levinson, 74 CHI.-KENT L. REV. 559 (1999).

72. I assume that scholars who believe that our society is committed to libertarian, civic-republican, or communitarian norms would make this objection.

73. Markovits, *Internally-Right Answers*, *supra* note 9, at 435-60.

rights questions, many believe that, at least in our society, the moral principle in question is liberal. This conclusion is obviously justified in relation to Ronald Dworkin, but I think it also applies to John Hart Ely, Philip Bobbitt, and Karl Llewellyn. In Ely's case, it is implied by the fact that Ely's argument for the fundamental character of the three sets of rights he claims the Constitution's text indicates are constitutionally fundamental assumes that our society is a liberal society. In Bobbitt's case, it is implied by the close connection between his conclusion about the central attribute of our *ethos* of government—namely, our commitment to limited government—and the liberal commitment to valuing each individual's developing his own conception of the good. In Llewellyn's case, it is at least suggested by the connection between the value of fair notice, which underlies Llewellyn's conclusion that vague and open-textured language in the Uniform Commercial Code should be interpreted in the way that is most consistent with relevant business practice, and the liberal value of appropriate, equal respect. Of course other legal experts who believe that the internally right answers to at least some moral-rights-related legal-rights questions are controlled by moral principle think that the applicable moral principle is not liberal. Thus, some legal historians of ideology think that our society is committed to civic-republican or communitarian values, and others at least flirt with the idea that our society is committed to and our law incorporates libertarian values.

Part III's demonstration that the basic liberal moral principle will often not favor economically efficient decisions implies that the conclusion that the internally right answer to all moral-rights related legal-rights questions will always be economically efficient would be rejected not only by me but also by a variety of other legal experts who disagree with me on some issues but do agree that the internally right answers to at least some moral-rights-related legal-rights questions are controlled by liberal moral principles.

Scholars who contend that our society and Constitution have adopted communitarian values will also not believe that the internally right answer to all the moral-rights-related legal-rights questions that these values control will be economically efficient. Take, for example, prohibitions of acts (reading particular books, seeing particular movies, dressing in particular ways, comporting oneself in a particular manner, engaging in certain kinds of sex, etc.) on which a deviant minority place a high equivalent-dollar value but a majority disvalues in part because they consider such conduct sinful and/or disruptive of the way of life they wish to foster. Assume that the individual deviant members of the community who want to engage in such conduct place a positive equivalent-dollar value on their doing so that is much higher than the negative equivalent-dollar values

that individual members of the majority place on the deviants' engaging in the conduct in question. Since communitarians would not believe that the magnitude of the relevant parties' absolute equivalent-dollar evaluations should determine the number of votes they have on such issues—they would place the highest value on the majority's being able to preserve the way of life the majority values (indeed, would conclude that individual members of the majority have a moral right to preserve the way of life these individuals value)—communitarian values would sometimes favor prohibitions that are economically inefficient.

I suspect that libertarian principles will also favor economically inefficient moral-rights decisions and hence economically inefficient moral-rights-related legal-rights decisions. When non-distributional moral rights are at stake, this conclusion follows from the fact that libertarian and liberal conclusions are often similar or identical. When distributional moral rights are at stake, the analysis is complicated by the ambiguity of the relevant libertarian norm. If, as my experience suggests, libertarians believe that all individuals are entitled to be paid wages that are proportionate to the average allocative products of the class of equally able and equally industrious workers who perform their respective types of labor, the instantiation of this norm will be incompatible with the achievement of economic efficiency. If libertarians believe that each individual is entitled to be paid the marginal allocative product of the last equally able and equally assiduous worker to perform his type of labor, the instantiation of this norm will also be incompatible with the maximization of economic efficiency in our actual, highly Pareto-imperfect world for two reasons: (1) because of the allocative cost of generating the valued distribution and (2) because of the externalities that this distribution will generate both directly by pleasing and displeasing individuals who subscribe respectively to libertarian and non-libertarian values and indirectly by affecting the consumption and labor decisions of various individuals—externalities that the relevant libertarian distributional norm deems irrelevant and that often libertarian norms may not internalize or may internalize only at some allocative transaction cost. And if libertarians believe that individuals are entitled to keep whatever they receive through gift or bequest, the effectuation of this norm will be economically inefficient insofar as it gives individuals incentives to behave in economically inefficient ways to elicit such gifts and bequests.

In short, (1) many legal experts who disagree with me on important issues related to legitimate and valid legal argument agree that moral principles control the internally right answers to some moral-rights-related legal-rights questions and (2) although some of these legal experts think that the moral principle that controls the inter-



nally right answer to some legal-rights questions is not liberal (is communitarian or libertarian), none of the principles the different experts think control the internally right answer to at least some moral-rights-related legal-rights questions always favors the economically efficient answer to such questions.

*B. When the Internally Right Answer to the Legal-Rights Question Is Personal-Ultimate-Value-Based or Goal-Based Because the Relevant Legal Right Was Created by a Properly Drafted Provision that Was Designed to Instantiate a Personal Ultimate Value or Achieve a Legitimate Concrete Goal*

Part II indicated that legal experts who subscribe to a wide variety of jurisprudential positions agree that the internally right answer to many legal-rights questions is the answer that instantiates the specific legislators' motivating personal ultimate value or the State's consistently adopted personal ultimate value or secures a concrete goal a legislature or administrative rulemaker sought to achieve. Part III's rejection of the claim that economic-efficiency analysis can serve as an algorithm for the generation of moral-ought conclusions in our culture—in part because the effectuation of many personal ultimate values will sometimes decrease economic efficiency—clearly implies that economic-efficiency analysis can also not serve as a universal algorithm for the generation of right answers to legal-rights questions that have correct answers that instantiate particular personal ultimate values or secure particular concrete goals.

Admittedly, the proximate goal of some statutes may be to increase economic efficiency. When efficiency is the goal, it is appropriate to interpret ambiguous statutory language in a way that maximizes economic efficiency. However, because I think that economists vastly exaggerate the number of statutes that were intended by their ratifiers to increase economic efficiency,<sup>74</sup> I suspect that economic-efficiency analysis can rarely serve as an algorithm for the generation of internal-to-law, correct interpretations of statutory language in our culture.

---

74. For example, contrary to the view of most economists and lawyer-economists, I do not think that the American antitrust laws were designed to maximize economic efficiency or should be interpreted in the way that would maximize economic efficiency. Richard S. Markovits, *Monopolistic Competition, Second Best, and THE ANTITRUST PARADOX: A Review Article*, 77 MICH. L. REV. 567, 577-94 (1979). I hasten to add that many economists acknowledge (indeed, stress) that much or most legislation reflects its supporters' rent-seeking rather than their pursuit of economic efficiency.

*C. When the Right Answer to the Legal-Rights Question Turns on Textual, Historical, Structural, or Other Considerations That Are Not Captured by Any Moral Principle or Personal Ultimate Value*

Part II also revealed that a wide variety of jurisprudential positions imply that the internally right answer to some legal-rights questions turn on neither moral principles nor personal ultimate values. These positions imply that the internally correct interpretation of many legal texts involves no reference to moral norms at all. Because economists recognize (indeed, stress) that the substance of many statutes is hard to justify in prescriptive moral terms and that many law creators do not aim to increase economic efficiency, they should not be surprised that economic-efficiency analysis cannot serve as an algorithm for the interpretation of these types of law-creating acts.

\* \* \* \*

Part IV has argued that economic-efficiency analysis is not an algorithm for the analysis of any of the three general types of legal rights I distinguished. Its discussion of this issue complements Part III's critique of Kaplow and Shavell's argument that courts ought always adopt economically efficient legal rules. However, it is important to emphasize that this conclusion does not imply that economic-efficiency analysis is never relevant to legal-rights analysis. To the contrary, economic-efficiency analysis will clearly be relevant to the interpretation of vague or open-textured language in statutes that were designed to achieve the proximate, concrete goal of maximizing economic efficiency or that were at least partially motivated by utilitarian concerns. Moreover, if I am correct in concluding (1) that the United States is a liberal, rights-based society, (2) that such societies are obligated to protect the moral rights of those for whom it is responsible, (3) that the liberal dualists are correct in differentiating the private and political obligations of members of liberal, rights-based States, and (4) when acting in their private capacities, members of a liberal, rights-based State are obligated to make all avoidance moves they would find profitable if they did an economically efficient amount of research into the consequences of their avoidance decisions and counted the equivalent-dollar effects of their choices on others as if they experienced those effects themselves, then an appropriate version of third-best-allocative-efficiency analysis—one that takes into account not only the existence of imperfections other than the imperfection to which the law is directly responding but also the allocative cost the relevant actors would have to generate to collect data and execute analysis of varying degrees of accuracy—will determine the tort-law obligations of such actors. Similarly, in the United States, economic-efficiency analyses may also have a critical

role to play in the resolution of a number of Commerce Clause and Federalism issues. I could go on, but the point should by now be clear: Even though economic-efficiency analysis is not nearly so relevant to legal-rights analysis as many economists and law-and-economics scholars claim, it can make significant contributions to legal-rights analysis in many contexts.

#### CONCLUSION

Most economists and law-and-economics scholars write and talk as if all economically efficient choices are consistent with our moral-rights commitments and would also be desirable if they were not proscribed or required by our moral-rights commitments. The literature contains hundreds of articles that implicitly assume this proposition and a few that explicitly try to justify it. Relatedly, many economists and law-and-economics scholars explicitly argue or implicitly assume that economic-efficiency analysis is an algorithm for the discovery of moral-rights-related common law and Constitutional rights and for the interpretation of statutes that were designed to achieve utilitarian goals.

This Article has analyzed the relevance of economic-efficiency conclusions to moral-ought, moral-rights, and various types of legal-rights analysis. It has demonstrated that, although economic-efficiency analysis can sometimes contribute to moral-ought, moral-rights, and legal-rights analyses, it is not generally an algorithm for the generation of any of these types of conclusions. In the course of establishing these conclusions, the Article has refuted various arguments that highly regarded economists or law-and-economics scholars have made to support their belief that economically efficient policies are always just and desirable.

Unfortunately, the tendency of economists to exaggerate the relevance of economic-efficiency analysis and conclusions is not just of academic interest. At least in the United States, the economics profession's exaggerated claims for the relevance of economic efficiency has caused public decisionmakers of all types to abdicate their moral responsibility both to base their decisions on rights-related issues on the moral principles we are committed to using in such contexts and to base their decisions on issues whose resolution is not determined by our rights-commitments on one or more appropriate personal ultimate values. The exaggerated claims that economists make for economic-efficiency conclusions not only cause public decisionmakers to violate moral and legal rights and to make choices that are undesirable from various value-perspectives—moral-rights considerations aside—but also create a risk that a public backlash may develop that will prevent economics from playing the useful role it can perform in

policy and legal-rights analysis. This Article is motivated not only by my desire to “get it right” but also my desire to prevent these damaging outcomes.

#### APPENDIX

This APPENDIX presents highly schematic accounts of six approaches to prescriptive moral analysis. Four of these approaches are “foundationalist” in the broader sense of that term—that is, they are designed to discover universally binding norms of justice. The remaining two approaches are much less ambitious. Proponents of these two non-foundationalist, “conventionalist” approaches reject the claim that there are universally binding norms of justice and concentrate on describing the moral practices of particular societies.

The four methodologies that are “foundationalist” in the broad sense of that term certainly overlap and may be coincident. The term “foundationalist” is used not only in the broad sense defined above but also in a narrow sense to denominate a particular approach to discovering universally binding norms of justice. Analyses that are “foundationalist” in this narrower sense proceed on the assumption that humans can recognize the basic universal norms of justice in something like the way we have access to truths about the physical world. Perhaps for this reason, philosophers who are foundationalist in this narrower sense tend to think that the best way to persuade others that a particular moral norm is the universally binding norm of justice is to give an account of societies that consistently implement the norm in question and compare such societies with societies of moral integrity that consistently implement other moral norms.

A second approach to moral-rights or justice analysis, which may be a variant of the first, might be called Aristotelian. The Aristotelian approach begins by developing an account of “human flourishing” and proceeds on the assumption that the moral norm whose effectuation would contribute most to human flourishing is the universally binding norm of justice.

A third approach to justice or moral-rights analysis is the “constructivist” approach associated with Kant. Although the following sketch of constructivist approaches may be even less adequate than the preceding descriptions of foundationalist and Aristotelian methodologies, I would say that constructivist approaches to justice use reason to explore the implications of a particular understanding of the goal of conversations about justice and moral rights—namely, to identify moral norms whose authority over us does not infringe our freedom.

A fourth approach to justice analysis that is foundationalist in the broader sense is the Natural Law approach. To be honest, I find it

difficult to provide even a sketch of the Natural Law methodology. My difficulties reflect both (1) the fact that many of the Natural Law philosophers I have read do not devote much attention to methodological issues and (2) my suspicion that different Natural Law philosophers use quite different approaches—for example, that the methodology that underlies Hobbes' reference to a Natural Law of self-defense differs significantly from the methodology that more modern Natural Law philosophers employ. Perhaps not. Perhaps the Natural Law approach proceeds on the assumption that acts or decisions are just if they are consistent with the universal nature of human beings. If so, the Natural Law methodology may be closer to the Aristotelian approach than one might otherwise think.

The last two methodologies I will describe are conventionalist, not foundationalist in the broader sense. Conventionalist methodologies do not attempt to articulate universally binding moral norms of any kind. On the assumption that one cannot go at all beyond the "is" of moral practice or enough beyond the "is" of the moral practice of particular communities to generate universally binding moral norms, conventionalists attempt to provide detailed accounts of the conduct of particular communities that its members consider to have a "moral dimension" in some sense that conventionalists leave more or less undefined. I will distinguish two variants of the conventionalist approach, which actually occupy extreme positions on the conventionalist continuum.

I denominate the first conventionalist methodology "pure conventionalism." The pure conventionalist employs no concept of "a community of moral integrity," of "moral norm," or of "acting from a moral position." This admittedly fictional figure simply reports the conduct of the communities he studies that its members consider to have a moral dimension in some undefined sense—that is, simply reports the self-described "moral" conventions of particular communities. The pure conventionalist does not comment, for example, on the possible moral significance of the fact that a society that is committed to liberalism in its moral-rights discourse makes legal decisions that do not instantiate liberal principles (that is, does not comment on the implications of this inconsistency for the moral integrity of the community in question). He also does not remark on the possible moral significance of the fact that the society he is studying has a caste system that it does not try to justify or justicize (render just) in any way. Indeed, if the society consistently applies caste-based decision-rules and decision-standards, the pure conventionalist will say no more than that this practice is part of the morality of the community in question. Conventionalists who are "pure" in the sense in which I am using this terminology will also not ask whether a narrow-gauged practice that is inconsistent with the "best" account that

can be given of a particular society's general or broad-gauged moral practice is immoral by the society's own standards: if the narrow-gauged practice is consistently followed, the pure conventionalist will describe it to be part of the community's moral practice.

This last point may be clarified through an illustration. Assume that the "best" account that can be given of a particular society's broad-gauged moral practice implies that it is a liberal, rights-based society.<sup>75</sup> Assume in addition that this conclusion partly reflects the fact that members of the relevant society:

- (1) Give substantial positive weight to the interests individuals have in forming and participating in intimate relationships that contribute to their discovering their personal ultimate values as well as to their actualizing these values; and
- (2) Give a positive weight as well to the desire of individuals to experience and give pleasure.

Now assume that this same society penalizes adults who participate in voluntary homosexual sexual activity on the ground that it disgusts the majority of its members even when such activity contributes to the formation and maintenance of broader intimate relationships. Assume as well that this society imposes no penalties on adults who participate in voluntary heterosexual sexual activity. The pure conventionalist would categorize this society's consistent treatment of homosexuals who engage in such sexual conduct as part of its morality. The pure conventionalist would not ask whether "disgust" can justify or justicize penalizing adult participants in voluntary homosexual sexual conduct. The pure conventionalist also would not ask whether this treatment of the relevant homosexuals might not be immoral by the community's own standards because it was inconsistent with the best account of the community's broad-gauged moral practice. The pure conventionalist would simply accept the community's own assessment of the morality of its narrow-gauged conduct.

The second kind of conventionalist approach and sixth type of methodology I want to describe overall might be termed a "qualified conventionalist" approach. This type of conventionalist approach is "qualified" because it proceeds on the assumption that the notions "moral norm," "acting from a moral position," and "being an individual or society of 'moral integrity'" have some essentialist attributes—

---

75. I assume that such accounts are evaluated according to a "fit" criterion (how well do they fit the community's relevant behaviors and perceptions) and an "explicability-of-(non-fit)" criterion (to what extent can the relevant non-fits be explained in ways that reduce the damage they do to the relevant account's persuasiveness). For a fuller description of this protocol, see MARKOVITS, *MATTERS OF PRINCIPLE*, *supra* note 9, at 13-34.

for example, that an individual or a State cannot be said to have moral integrity unless they behave morally consistently to some hard-to-specify extent. A qualified conventionalist would therefore conclude that a consistent narrow-gauged practice was immoral for essentialist reasons if its alleged justification (disgust) were unacceptable and was immoral by the community's own standards if it were inconsistent with the best account of the community's commitments—perhaps with the way in which the society in question generally responded to conduct that implicated the same interests that the narrow-gauged practice affects to the same extent that the narrow-gauged practice did.

As I indicated earlier, most conventionalists fall somewhere between the pure conventionalist and qualified conventionalist poles of the conventionalist distribution. In practice, I doubt if any conventionalist is willing to accept a community's "own perception of the moral dimensions of conduct" (whatever that might mean)—that is, all conventionalists assume that the concept "moral" has some essentialist elements. However, many conventionalists seem willing to accept as "moral" (1) a community's use of a caste system that it considers to be moral despite the fact that it offers no justification for the system in question and (2) a community's unreasoned refusal to instantiate the same set of norms in different spheres of activities, and some conventionalists seem also willing to characterize as moral a community's consistent narrow-gauged practice that is inconsistent with its broad-gauged practice in what would appear to be the same sphere of activities.

My approach to analyzing the moral character and more specific-moral commitments of any particular society such as the United States is qualified conventionalist. However, it is important to emphasize that my critique of the claims that economists make for the relevance of economic-efficiency conclusions to prescriptive moral analysis does not depend on the "correctness" of this methodology. That critique depends solely on the coherence of moral norms that do not focus exclusively on the maximization or distribution of utility and, more particularly, on the conclusion that the various moral norms of this sort that can be distinguished (the liberal norm I think the United States is committed to instantiating when making decisions that implicate moral rights, various types of libertarian norms, and the various non-liberal and non-utilitarian egalitarian norms on which members of our society base their conclusions about what morally-ought to be done) do not always favor the economically efficient choice. Since (1) philosophers who are foundationalist in the broader sense of that term believe that such norms are coherent and (2) proponents of all the methodologies this APPENDIX has sketched may accept my account of the various norms in question, my refuta-

tion of the claims that economists make for the prescriptive moral relevance of economic-efficiency conclusions does not depend on the correctness of the prescriptive moral methodology I employ.